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No. _____

In the Supreme Court of the United States

October Term, 1987

OAHU GAS SERVICE, INC.,

Petitioner,

v.

PACIFIC RESOURCES INC., GASCO, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Given monopoly power in properly defined relevant product and geographic markets, under what circumstances can an appellate court determine that the monopolist's conduct is procompetitive as a matter of law and under what circumstances must the appellate court abide the fact finder's determination if supported by substantial evidence?

THE PARTIES

Petitioner-plaintiff is Oahu Gas Service, Inc., a distributor of propane in the State of Hawaii. Respondents-defendants are Pacific Resources Inc. and Gasco, Inc. PRI is the parent corporation of Gasco. Gasco, Inc. distributes both propane and synthetic natural gas in the State of Hawaii.

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OPINIONS BELOW

The Ninth Circuit filed three separate opinions in this case. The first opinion was filed on October 9, 1987. A copy of this opinion is attached as Appendix A. The court filed an amended opinion, reported at 829 F.2d 1471 (9th Cir. 1987), on November 27, 1987. A copy of this amended opinion is attached as Appendix B. The first two opinions affirmed in part and reversed in part. On February 1, 1988, the Ninth Circuit withdrew its prior rulings and filed a third opinion, reported at 838 F.2d 360 (9th Cir. 1988). The third opinion reversed *in toto*. This final opinion is attached as Appendix C.

JURISDICTIONAL STATEMENT

The Ninth Circuit filed its third and final opinion in *Oahu Gas Service, Inc. v. Pacific Resources Inc., Gasco, Inc.*, No. 86-2250, on February 1, 1988. The Ninth Circuit denied Oahu Gas Service, Inc.'s timely petition for rehearing and suggestion for rehearing *en banc* on March 22, 1988. A copy of that order is attached as Appendix D. Oahu Gas Service, Inc. filed this Petition for Writ of Certiorari within ninety (90) days of that date. Jurisdiction of this Court is founded on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2 of the Sherman Act, 15 U.S.C. § 2, provides in pertinent part:

> Every person who shall monopolize . . . any part of the trade or commerce among the several States . . . shall be deemed guilty . . . .

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides in pertinent part:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained . . . .

STATEMENT OF THE CASE

A. Statement of Facts.

(1) Overview.

This lawsuit involves the actions of Gasco, Inc. ("Gasco") and its parent, Pacific Resources Inc. ("PRI") to maintain their monopoly of the propane gas market in Hawaii by unreasonably exclusionary conduct.

Until 1972, Gasco was the sole distributor of propane and SNG, an almost perfect propane substitute, in Hawaii. Gasco offered two separate services: it sold propane in tanks and it provided, as a regulated utility, propane and SNG via pipeline.

In December 1972, Oahu Gas Services, Inc. ("OGS") was formed to distribute propane in tanks, in direct competition with both Gasco's tank propane sales and its utility service. Obtaining its supplies from Chevron, the only refiner of commercial grade propane in the islands, OGS was the first and only serious competitive challenge Gasco has ever faced.[1]

Gasco and PRI undertook, at different times, two different strategies to eliminate the new entrant, OGS. Defendants' first strategy was to exacerbate existing propane shortages in Hawaii during a period of government control, thus limiting the amount of propane available to OGS. Appreciating that existing shortages of propane resulting from the Arab oil embargo constituted the best way to limit OGS' ability to challenge Gasco's monopoly, the defendants undertook a variety of actions to ensure that Hawaii's chronic shortage of propane would not be alleviated. Key among these actions was the defendants' decision to halt construction of a long-planned propane recovery unit as part of their ongoing refinery expansion.

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[1] No other viable propane distributor has entered the Hawaiian market successfully. As of trial, there was one new entrant, Aloha LPG Gas, Inc. This company could not, however, be considered a significant competitive factor. The company had no full-time employees and no storage facilities. (RT 14:109-10.) It had only a single truck and was completely dependent on the defendants for propane supplies. (Id. at 109-11.) As of 1985, its share of the market was less than one-tenth of one percent. (Ex. 1318.)

The defendants implemented a second anti-OGS strategy after government controls ended and after they finally built the propane unit. No longer able to exploit shortages in supply, the defendants sought instead to reduce dramatically the plaintiff's revenues by making false offers of low prices to customers under long-term contract with OGS. These "sham" offers by Gasco had the direct and intended effect of forcing OGS to renegotiate its prices mid-contract and reducing its stream of revenues. As a net result of the defendants' conduct, OGS was unable to serve markets on Hawaii's outer islands and to compete vigorously in the propane market in Oahu.

(2) Defendants' Artificial Limits on the Supply of Propane Available to OGS.

The original strategy undertaken by the defendants to stymie their new market rival had as its foundation the maintenance of embargo-related propane shortages in Hawaii. Historically, Gasco purchased its supplies exclusively from Chevron. To reduce its dependency on Gasco as its sole outlet and to introduce competition in the downstream market, Chevron encouraged James Frandsen to form OGS, and eventually contracted with OGS for propane supplies. (Ex. 958.) Gasco responded by attempting to preempt OGS from a reliable source of supply. Gasco urged Chevron to allow it to purchase "every gallon of propane [Chevron] could produce." (Ex. 601; Ex. 1226; Ex. 737.)

Within months of OGS' entry into the Hawaiian propane market, the Arab oil embargo and the subsequent imposition of federal regulatory controls on propane dramatically altered the market for propane in Hawaii. On the one hand, federal price regulations

resulted in a dramatic increase in prices for SNG pipeline customers. (RT 2:106, 108-09; Ex. 650.) SNG, delivered by pipeline to Gasco's utility customers, cost 40%-50% more than OGS' propane in tanks. (Ex. 1237.) Due to its tremendous price advantage, OGS was positioned—subject only to available supply—to capture much, if not all, of Gasco's utility customers.[2] Gasco was painfully aware of this prospect and of the need to curtail OGS' ability to "raid" its vulnerable SNG customer base. (Ex. 650.)

The imposition of regulations, however, greatly advantaged Gasco over its upstart rival in one significant aspect: supply of propane. Under federal regulations, OGS and Gasco were allocated a proportional share of the refined propane in Hawaii based on their historic consumption levels. Because OGS' base period was calculated during its infancy, it received a very small allocation of the total amount of available propane in Hawaii.

Gasco quickly recognized that this limit on OGS' supplies constituted the defendants' most effective means of limiting OGS' price competition and its growth. (Ex. 650.) By ensuring that no expansion in available supplies would occur, Gasco could restrict OGS to those few customers that its existing allocation of propane supplies would permit it to serve. (Ex. 449 at 4; Ex. 1073 at 7-8; Ex. 655.) Thus, by limiting the existing production of propane to that amount currently being refined by Chevron, Gasco could also severely restrict OGS' incursion into its utility customer base without having to reduce prices to match those of its smaller rival. (Ex. 650.)

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[2] As a highly placed Gasco officer admitted, "if OGS had more to sell . . . they [would] sell more." (RT 3:50.)

The defendants were peculiarly able to limit the expansion of propane production in Hawaii due to one simple fact—PRI's refinery subsidiary, Hawaiian Independent Refiners Inc. ("HIRI") had existing plans to add to its refinery a unit to produce propane. As an incidental part of the already undertaken expansion of HIRI's refinery, the propane unit was, in view of Gasco's propane needs, a natural use of the HIRI refinery's by-products. By abandoning the long-scheduled construction of the propane recovery unit, the defendants purposefully limited propane supplies in Hawaii. In addition, on at least two other occasions during this period, Gasco vetoed proposals that would have augmented Chevron's propane production capacity to ensure that OGS would receive no additional propane. (Ex. 1211; Ex. 724.)

Absent the defendants' desire to limit the amount of propane available to OGS, the propane recovery unit would have been built. The propane recovery unit was well beyond the planning stage. Engineering consultants had prepared project specifications, a voluminous environmental impact statement had been filed with the State of Hawaii and defendants had made an application to the Department of the Interior for approval to import crude inputs for the propane unit. (Ex. 1300; Ex. 1360; Ex. 1349.) As evidence of its intentions, HIRI made repeated assurances to its sister subsidiary, Gasco, that it "will be constructing facilities before 1976 which will have the capability of producing approximately 1,000 barrels per operating day of propane." (Ex. 243; Ex. 1331(B).)

Despite testimony at trial by the defendants that their decision to abandon construction of the propane unit

was based on economic considerations (RT 13:101-02), not a single document analyzing or evaluating their business decision was ever produced. Nor did their witnesses offer a single, consistent explanation as to why they abandoned their plans to construct the unit. At trial, Gasco executives, principally its Board Chairman James Gary, testified that they terminated the project because economic studies disclosed that federal regulations made it impossible for them to ascertain the market price and profitability of the venture. (RT 13:101-02.) Challenged to produce even a single such study, Mr. Gary retreated, claiming that in fact he did not make the decision but that the propane unit was "knocked out by the engineers." (RT 6:107.) Not surprisingly, the jury accorded the defendants' purported justification little credibility.[3]

The defendants' decision to abandon their propane refining plans in order to limit the supply available to OGS had profound negative effects in the Hawaiian market. Throughout the period 1973-1980, there were dramatic shortages of propane in Hawaii. These shortages were, in significant part, made up through the importation of high-priced foreign propane. Under existing governmental regulation, Gasco passed through the higher costs of these imported supplies to its customers. (RT 2:78-79.) Between 1973 and 1980, Hawaiian propane consumers paid almost $11.6 million in wholly unnecessary and avoidable increased prices

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[3] Another reason for the jury's skepticism, perhaps, was the fact that at the same time it cancelled the propane unit purportedly because of the uncertainty of federal regulations, HIRI expanded its refinery to produce, for the first time, gasoline, a product that was subject to the same federal price regulations as propane. (RT 6:102-03.)

for propane in order to subsidize the defendants' anti-OGS strategy. (Modified Ex. 1320.)

The defendants' shortage-inducing strategy was not without costs to Gasco. The uncertainties of supply resulting from Gasco's reliance on imported foreign propane were significant throughout the period. As Gasco's Vice President eloquently testified, "We've had tankers stuck on the other side of the Panama Canal, hung up in Australia because of strikes, we couldn't load and on several occasions we were on the brink of running out of gas for our customers." (RT 2:51-52.) In fact, when the propane recovery unit was reapproved in 1981, an important justification given for its construction was "security of propane supply not vulnerable to dock strikes, shipping delays, price swings, etc." (Ex. 213 at 186919.) HIRI also incurred costs due to its abandonment of the unit. When HIRI ultimately did construct the propane recovery unit in 1981, inflation caused the construction costs to exceed the original estimates by three million dollars. (RT 5:90; RT 6:124.)

(3) The 1982 "Blitzkrieg."

With deregulation and the long-delayed construction of HIRI's propane recovery unit, it became impossible for defendants to limit successfully OGS' supplies. The defendants, therefore, abandoned that strategy and devised another plan to drive their smaller rival out of the propane market.

Concerned that a fully supplied OGS could now challenge both Gasco's dominance on Oahu and its 100% monopoly in the outer islands (Ex. 1161), Gasco launched a "blitzkrieg" of key OGS customers. Gasco would approach propane customers it knew to have long-term contracts with OGS and "offer" them propane at

prices below those of OGS. (App. C at C21.) Gasco's solicitations, however, were never intended to capture OGS customers or generate new business. Indeed, Gasco expressly denied that it made these low price offers to OGS' customers in order to encourage them to breach their long-term contracts and switch to Gasco. (*Id.*) Moreover, Gasco's offers to its own customers were far less attractive than those made to OGS' customers and were actually written in such a way as to discourage interest.[4] (*Id.*)

As acknowledged by the jury and Ninth Circuit, Gasco's offers were nothing but "shams," intended not as legitimate price competition but rather to cut into OGS' profits. (*Id.*) Unlike a monopolist's business decision to lower its own prices, Gasco's "blitzkrieg" was merely a ploy to force OGS to lower its prices to existing contract customers.[5] (*Id.*)

As Gasco expected, the "blitzkrieg" substantially reduced OGS' revenues and drove it perilously close to bankruptcy. In fact, it was on the basis of such a showing that the district court in Hawaii entered a Preliminary Injunction in June 1982 to halt Gasco's conduct. (CR 184.)

The impact of the defendants' 10-year campaign had significant adverse economic consequences both for OGS and for competition in the Hawaii propane market. Unable to obtain additional supplies of propane throughout most of the period, OGS was prevented from

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[4] It was not surprising that out of 88 Gasco proposals to its own customers, only 7 were accepted. (Ex. 1155; Ex. 2810.)

[5] As admitted by one of the key Gasco "blitzkrieg" participants, when she presented an "offer" to an OGS customer, she invited him to call OGS to see if they wanted to make a counterproposal. (RT 7:18-19.)

competing for many customers who paid Gasco for utility service at rates up to twice what OGS charged for propane. (Ex. 650.) Even after its propane supply shortage was alleviated in the early 1980's, OGS was still competitively handicapped by Gasco's "blitzkrieg." Because of the reduction in its revenues caused by the defendants, OGS was unable to expand to the outer islands and challenge Gasco's absolute monopoly in those markets.

B. The Court of Appeals' Decisions.

Symptomatic of its confusion regarding this appeal, the Ninth Circuit wrote three separate opinions over a five month period in its effort to resolve the antitrust issues presented. In all three opinions, the Court of Appeals accepted the jury's finding that the relevant product market was propane and that the relevant geographic market was the State of Hawaii. In addition, in all three decisions the Court of Appeals affirmed the jury's conclusion that the defendants had monopoly power.

The Ninth Circuit did not, however, abide the jury's determination that the defendants' efforts to eliminate OGS constituted predatory conduct actionable under Section 2. In all three of its opinions, the Ninth Circuit found, as a matter of law, the defendants' last minute abandonment of the propane recovery unit was permissible under Section 2. Finding that the defendants' stated rationale for abandoning the unit constituted a legitimate business justification, the Court exonerated the defendants.

As for the defendants' "blitzkrieg" against OGS, the Ninth Circuit underwent a dramatic metamorphosis between its first and last opinions. The Ninth Circuit's

first two opinions held that the defendants' program of sham offers were without justification and violative of Section 2. In its third opinion, without inviting OGS to respond to the defendants' pending rehearing petition,[6] the Ninth Circuit abruptly reversed itself, concluding that the "blitzkrieg" was lawful. Holding in essence that Gasco's conduct had no effect other than to compel its smaller rival to lower prices, the court held that the defendants' conduct was "procompetitive" and, therefore, could not be considered actionable under Section 2.[7]

REASON FOR GRANTING THE WRIT

This appeal presents a vital question in the administration of Section 2 of the Sherman Act: who (court or jury) gets to decide whether the conduct of a monopolist is predatory or unreasonably exclusionary? Today, lower courts are carving out free zones of "legitimate" monopolistic behavior purely as a matter of law. Courts have spent much of their energies attempting to pigeonhole a myriad of unique factual controversies into existing categories of per se lawful activities. No court, however, has ever sought to articulate answers to two separate but related questions:

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[6] Defendants petitioned the Ninth Circuit for Rehearing with a Suggestion for Rehearing *En Banc* on the "blitzkrieg" aspect of the case following the issuance of the first opinion. A copy of the defendants' brief in support of that petition is attached as Appendix E. On November 27, 1987, when the Court of Appeals issued its amended opinion, that petition for rehearing had been pending for approximately thirty (30) days.

[7] As if to apologize for reaching this result, the Court pointed out that while the defendants' conduct should not be condoned and probably would have been independently actionable under state tort law, it did not constitute monopolistic conduct under Section 2 of the Sherman Act. (App. C at C22.)

(1) what monopolistic behavior can be held procompetitive as a matter of law, and (2) what monopolistic behavior presents for a jury a justiciable fact issue, the determination of which is subject only to a substantial evidence review standard. This case presents the Court with an opportunity to address these basic questions.

The central goal of antitrust and the foundation upon which it is predicated is the production of the best possible goods and services at the lowest possible price. Although this goal is often best served by maximizing competition among many market participants, the law does recognize that where the ends of lower prices and better products are achieved in a market dominated by a single competitor, antitrust law should not intervene to effect a different outcome. Thus, as articulated by this Court in *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966), a monopolist may acquire or maintain its dominance through superior products, skill or business acumen without evoking the prohibitions of Section 2. As an outgrowth of that doctrine, courts have found little difficulty in holding that product innovation, non-predatory pricing and entry or exit from a market are permissible acts even if done by a monopolist because they benefit consumers through improved products and/or lower prices. *See Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370, 376 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 1574 (1987); *Airweld, Inc. v. Airco, Inc.*, 742 F.2d 1184, 1193 (9th Cir. 1984), *cert. denied*, 469 U.S. 1213 (1985); *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534 (9th Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); *California Computer Products, Inc. v. International Business Machines Corp.*, 613 F.2d 727 (9th Cir. 1979).

Much monopolistic conduct, however, is not capable of being characterized as uncontrovertedly procompetitive as a matter of law. For example, it would be wholly improper for a court to adjudicate the legality of a monopolist's conduct as a matter of law if the defendant's proffered procompetitive justification is controverted by substantial evidence presented by the plaintiff. *See, e.g., William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1034 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982). Where a factual controversy exists as to the purpose and effect of a monopolist's conduct, the differing versions must be submitted to a fact finder for resolution. *See Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1058 (9th Cir.), *cert. denied*, 464 U.S. 849 (1983); *Sherman v. British Leyland Motors, Ltd.*, 601 F.2d 429, 454 (9th Cir. 1979).

Additionally, if a monopolist's conduct cannot be characterized as unequivocally procompetitive, *i.e.*, efficiency enhancing and beneficial to consumers, the question of whether it is unreasonably exclusionary or predatory must be submitted to the finder of fact. *See, e.g., Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985). The reasonableness of a defendant's conduct is a paradigm fact question that must be assessed in light of its effect on consumers, the plaintiff and the defendant itself. *See id.; see also Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700, 702-03 (1969); *Betaseed, Inc. v. U & I, Inc.*, 681 F.2d 1203, 1228 (9th Cir. 1982) (reasonableness of a restrictive practice is a paradigm fact question). On appeal, these factual determinations are to be construed in a light most favorable to the prevailing party and they must be upheld if supported by reasonable evidence. *Continental Ore Co. v. Union*

Carbide & Carbon Corp., 370 U.S. 690, 696 (1962). That contrary inferences may be drawn from the evidence does not justify an appeals court's rejection of a jury's otherwise supportable conclusion. *Id.*; *Tennant v. Peoria & P.U. Railway Co.*, 321 U.S. 29, 35 (1944) (It is not the function of the appellate court to search the record for conflicting evidence in order to take the case away from the jury.); *Lavender v. Kurn*, 327 U.S. 645, 652-53 (1946).

The Ninth Circuit, in refusing to abide the jury's determination that the defendants' anti-OGS strategy unreasonably restrained competition, divined a new approach to Section 2 conduct questions. In essence the court held that if the defendant can proffer *any* evidence of a justifiable business purpose for its conduct, it prevails as a matter of law regardless of whether efficiency has been enhanced or consumers have been benefitted, or whether a jury has already found that justification to be pretext, not real. (App. C. at C18.)

Viewed under the proper analytic framework, the factual record presented to the appellate court does not support its finding that the defendants' conduct was per se lawful. The defendants' decision to terminate the planned expansion of the HIRI refinery to produce propane had the purpose and effect of continuing shortages, increasing prices, adding significant operational costs and obstacles for the defendants and diminishing the ability of a rival to afford consumers the benefits of competition. In addition, the plaintiff submitted substantial evidence in support of its contention that it was OGS and not the economics of the recovery unit that primarily motivated the defendants. As controverted by substantial evidence, the defendants' purported justification was properly for a

jury and should not have been determined unilaterally by the appellate court.

Finally, Gasco's tortious conduct of interfering in OGS' long-term contractual relations in order to reduce the revenue stream of its rival cannot possibly evoke the same protection afforded under *Grinnell* to a monopolist's efforts to compete on the merits. Gasco's "blitzkrieg" presented a factual controversy for the jury as to whether its overall purpose and effect was unreasonably exclusionary or restrictive of competition.

There is, as evidenced by this case, a need for this Court to articulate clearly and concisely how lower courts are to approach their review of monopolistic conduct. Whether the Ninth Circuit's decisions in this case stem from a distrust of the jury system or from a misunderstanding of their appellate function in monopoly cases, it is important that appeals courts be told that it is not their function to take ambiguous monopolistic conduct and force it into a free zone of legitimacy.

For these reasons, the Court should grant certiorari.

ARGUMENT

A. The Ninth Circuit Erred in Finding the Defendants' Conduct Permissible Under Section 2 as a Matter of Law.

The Ninth Circuit, in its three *OGS* opinions, immunized the defendants' conduct without a proper assessment of its impact on efficiency or consumers and without recognizing the jury's assessment of the evidence.

(1) The Defendants' Supply-Related Conduct Was Not Uncontrovertedly Procompetitive.

The Ninth Circuit made two fundamental errors in its assessment of the defendants' supply-related conduct. First, the court disregarded the factual record when it found that the uncontroverted rationale for the defendants' abandonment of the propane recovery unit was concern that the investment would have resulted in negative returns under existing federal price controls. (App. C at C17.)

The factual record contained substantial evidence adduced by the plaintiff that controverted the defendants' financial justification for halting construction of the propane recovery unit. Supporting the jury's conclusion that the defendants' profitability argument was mere pretext, there was never a single document produced containing an analysis of the profitability of the propane project.[8] In addition, the defendants' own witnesses proffered inconsistent rationales for their decision to halt

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[8]The sole evidence relied on by defendants to show that the HIRI propane recovery unit would have been uneconomic was a study by Chevron of the economics of its own refinery operation, unearthed during discovery in this matter. (Ex. 2656.) Contrary

construction of the propane unit.[9] Finally, the jury heard testimony regarding the defendants' other efforts to limit the supply of propane available to OGS.[10] (Ex. 1211.)

The Ninth Circuit's second error was ruling as a matter of law that the defendants' fear of negative returns from the propane unit constituted an absolute bar to liability

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to defendants' characterization, this study did *not* assert that Chevron's propane operations were unprofitable. Rather, it showed only that products other than propane might be, under existing regulations, more profitable. Even if defendants' mischaracterization of this memorandum is accepted, such a post-hoc rationalization of HIRI's decision not to go forward with its plans cannot seriously be considered as adequate proof that the HIRI propane add-on would have been unprofitable. First, defendants, at the time of their decision to halt development of the propane unit, did not have access to Chevron's operating information. Second, even if Chevron's propane unit were not making money, that operation's performance could not be generalized to the defendants, who, unlike Chevron, had supply demands from the integrated distributor, Gasco, that enhanced the value of the contemplated supply of propane. (Ex. 1331(A).)

[9] On his first day on the stand, Mr. Gary, PRI's Chairman, testified that he "could never get our people pinned down on . . . an accurate cost estimate" because Gasco "could never understand the federal pricing regulations sufficiently to know what we could charge for propane." (RT 5:65.) He also testified that he personally decided to abandon the unit (RT 5:79) and that there was an economic analysis memorializing that decision. (RT 5:178.) Counsel for the plaintiff, at that point, directly challenged him to produce that proffered analysis the next day. (RT 5:179.) On the next day, however, Mr. Gary, unable to locate any such analysis (RT 6:130-31), began to retreat. Directly contrary to his earlier testimony, Mr. Gary testified that the decision to cancel the propane unit never reached him "because it was knocked out by the engineers." (RT 6:107.)

[10] For example, when a Gasco employee suggested a permanent exchange of HIRI-produced by-products in return for Chevron propane, Gasco rejected the offer because the production of additional propane in Hawaii would be "detrimental to Gasco's marketing in the long term" in that a part of the increased supply would be allocated to OGS under federal regulations. (Ex. 1211.)

under *Grinnell's* exception for business acumen. The court, as many appellate courts have done, did not evaluate the efficiency implications of the defendants' conduct before labelling it per se lawful. Rather, relying on a Webster's definition of business acumen, the court merely pigeonholed the defendants' avoidance of unprofitable investments as one of the enumerated *Grinnell* defenses and declared the conduct permissible under Section 2.

The conduct presented in this case demonstrates the danger of an appellate court using labels to distinguish lawful from unlawful conduct. Before exculpating monopolistic conduct, the court should look not to a list of categorical free zones for its analysis, but rather to the underlying efficiency justifications upon which those absolute defenses are grounded. Thus, before exonerating a defendant, the court has to ensure that the conduct enhances efficiency and benefits consumers.

Had the Ninth Circuit evaluated the defendants' supply restrictive strategy in light of its overall effects on efficiency and consumers, it could not have concluded that the conduct qualifies for immunity as a matter of law under the business acumen exception. The defendants' decision to abandon the propane recovery unit had profound adverse effects on consumers, OGS and the defendants themselves. Consumers paid for the defendants' decision to limit local propane supplies through higher prices, necessitated by Gasco's reliance on expensive imported propane.

Not only was OGS directly and intentionally injured by the defendants' conduct, but the defendants themselves were harmed by their inability to secure safe and guaranteed sources of supply. In addition to the uncertainty created by Gasco losing an integrated source

of propane supplies, the defendants incurred the expense of having to locate scarce supplies and import them to Hawaii. Moreover, the six or seven year delay in actually constructing the unit cost HIRI $3 million in inflated construction costs. These costs were never considered by the Ninth Circuit in its determination that construction of the propane unit would have resulted in negative returns.

As this analysis of the record illustrates, it was error for the Ninth Circuit to elevate the defendants' justification to per se lawful conduct without a careful examination of whether the conduct had the net effect of producing better products at lower prices or otherwise benefitting consumers. The court's analysis, citing only to "economic necessity" as sufficient to satisfy *Grinnell's* business acumen exception, failed to consider the ample evidence in the record supporting the jury's conclusion that the conduct was unreasonably restrictive of competition and not otherwise justified as legitimately efficiency enhancing or beneficial to consumers.

Based on the testimony of witnesses and examination of the trial exhibits, the jury's conclusion that the defendants' stated justification was not credible was supported by substantial evidence. *Cf. Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 296 n.7 (1985) (Court observed that purported procompetitive justifications could indeed be pretext to conceal anticompetitive animus and that such evaluations were part of the rule of reason analysis.). The appellate court's rejection of the jury's conclusions constitutes, without more, reversible error. *Lavender*, 327 U.S. at 752-56 ("Where . . . there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts

are inconsistent with its conclusions. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.").

(2) The "Blitzkrieg" Conduct Was Incorrectly Viewed by the Ninth Circuit as Procompetitive.

The sudden and unexplained reversal of the Ninth Circuit's position in its two earlier opinions regarding the illegality of the Gasco "blitzkrieg" is unexplainable. In the first opinion, the court, applying a clear and convincing evidence standard, found that Gasco's "blitzkrieg" of OGS' customers was predatory. (App. A at A13.) This position was emphasized even more forcefully in the court's amended opinion. "This is not a predatory pricing case. The evidence relevant to the finding of predatory conduct in this case is not the prices Gasco offered. It is the contracts themselves and the testimony about how those contracts were offered to customers of Gasco and [OGS]." (App. B at B12-B13.)

Employing the efficiency calculus articulated in this petition, the Ninth Circuit in its amended opinion considered the impact of the conduct on market performance and consumer welfare. "If conduct by a monopolist does not enhance the quality or attractiveness of the product, reduce its costs, or alter the demand function that all competitors confront, and is driven by a purpose to create a monopoly by means other than fair competition, it violates section 2." (*Id.* at B13.) The court then concluded that the defendants' fraudulent offers of cut prices, the only rationale for which was to drive rivals out of the market, were within the ambit of Section 2's prohibitions. (*Id.*)

Two months after filing its amended opinion, the Ninth Circuit renounced its prior position regarding the "blitzkrieg." Deciding that because a select number of OGS' customers received the benefit of lower prices indirectly through Gasco's interference, the court found the defendants' actions procompetitive as a matter of law. (App. C at C21-C22.)

Where the court's "blitzkrieg" analysis errs is in its application to the specific facts presented to the jury. The record in this case shows that the nature and intensity of competition between these entities in a geographically isolated market was truly diminished as a result of the defendants' conduct. To conclude otherwise, the Ninth Circuit had to ignore evidence that: (1) this was a two-competitor market; (2) OGS had to seek and secure a preliminary injunction in order to save its business from the Gasco "blitzkrieg"; (3) OGS, had it been able to maintain its existing revenue stream, was a likely entrant into the outer islands, where Gasco maintained a 100% monopoly, so that the "blitzkrieg" operated both as a warning and an effective method to thwart OGS' expansion to the outer islands; and (4) the diminution of OGS' revenue stream as a result of the "blitzkrieg" had the attendant effect of limiting its ability to finance improvements to its plant and equipment and to expand its market share on Oahu by offering enhanced services and lower prices to its actual and potential customers.

It is preposterous to conclude, as did the Ninth Circuit, that the defendants' conduct enhanced long-term competition in the relevant market merely because a single customer group received a temporary price reduction. As clearly established in the Ninth Circuit, the imposition of above-cost prices by a monopolist can constitute predatory conduct where the justification is

based, not on their effectiveness in minimizing losses, but on their tendency to eliminate rivals. *Inglis*, 668 F.2d at 1014.

This was a case in which the defendants' imposition of lower prices on OGS was undertaken not to minimize Gasco's losses, but solely to eliminate its smaller rival. Thus, the defendants' conduct was improperly adjudicated procompetitive as a matter of law. The Ninth Circuit's intervention constitutes error and illustrates vividly the need for this Court to clarify how the question of lawful conduct under Section 2 should be assessed and by whom.

CONCLUSION

The Ninth Circuit has turned the analysis of a monopolist's conduct on its head. Now, instead of subjecting the defendants' actions to an efficiency analysis as dictated in *Aspen*, appeals courts are free to select any justification proffered by the monopolist and, disregarding evidence that it is merely pretext, elevate that justification to one that is exempt from the antitrust laws.

The Ninth Circuit's decision in this case will be comforting to those leading the attack on antitrust. But it is a serious blow to small competitors like OGS who dare to challenge a monopolist and offer the consumer lower-priced alternatives. Does this Court want to encourage and endorse, by benign neglect, the kind of conduct evidenced in this case? OGS urges the Court to grant certiorari and review the decision below.

Dated: June 20, 1988

Respectfully submitted,

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APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OAHU GAS SERVICE, INC.,
Plaintiff-Appellee,

v.

PACIFIC RESOURCES INC., GASCO, INC.,
Defendants-Appellants.

No. 86-2250
D.C. No. CV-77-0444-PGR
OPINION

Argued and Submitted
August 10, 1987—San Francisco, California

Filed October 9, 1987

Before: Eugene A. Wright, Jerome Farris and David R. Thompson, Circuit Judges.

Opinion by Judge Farris

Appeal from the United States District Court
for the District of Hawaii
Paul G. Rosenblatt, District Judge, Presiding

SUMMARY

Antitrust

Appeal from judgment. Affirmed in part, reversed in part, remanded in part.

Appellants Gasco, a subsidiary of Pacific Resources, was the sole retail seller of propane gas in Hawaii. In 1972, appel-

lee Oahu Gas Service began selling propane on Oahu. Both of their propane supplies came from Chevron. During the energy crisis, price controls on domestically produced propane led Chevron to produce the minimum required by the Department of Energy. Gasco bought increasing amounts of propane from foreign suppliers. Oahu Gas repeatedly applied to, and finally received from, the Department for larger allocation of propane. One basis for Oahu's Sherman Act allegations was the decision of Hawaiian Independent Refinery, Inc., a subsidiary of Pacific Resources, not to produce propane in the 1970s. The refinery expanded only to permit gasoline production. After price controls ended, the refinery was modified to produce propane. Another basis for Oahu's allegations was Gasco's marketing program in 1982. With the end of regulation, Gasco began a marketing program that included offers of low-cost long-term contracts to large-volume purchasers, both its own customers and Oahu Gas customers. Oahu asserted at trial that the offers were "shams," designed to force Oahu to cut prices to its own customers. Oahu sought and obtained an injunction prohibiting Gasco from soliciting Oahu's customers while they were under contract to Oahu. Oahu's claims of monopolization and attempted monopolization went to trial. The jury returned a verdict in favor of Oahu and found treble damages and awarded attorneys fees.

[1] The offense of monopolization under Section 2 of the Sherman Act has two elements: the possession of monopoly power in the relevant market and the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product or business acumen. [2] The jury's finding that Gasco had monopoly power in the whole Hawaiian propane market is consistent with the Court's view that monopoly power involves the potential for genuine adverse effects on competition. [3] This court determines antitrust liability by asking whether Pacific Resources' decision not to expand its refinery unnecessarily excluded competition. Because producing propane would

have been uneconomical at the time. Pacific Resources' decision to forego propane production did not exclude competition *unnecessarily*. [4] At trial, a plaintiff in Oahu's position must show by clear and convincing evidence that the defendant's pricing policy had a predatory rationale. The evidence is not the prices Gasco offered, it's the contracts themselves and how they were offered to customers. [5] The jury may be presumed to have accepted Oahu's claim that the cut-rate contracts were "shams," and evidence in the record supports this claim. [6] Because this court partially reverses the judgment, the district court, on remand, must strike the damages based on the refinery episode. As for the damages based on the 1982 marketing campaign, this court affirms.

COUNSEL

William S. Boyd, San Francisco, California, for the defendants-appellants.

Maxwell Blecher, Los Angeles, California, for the plaintiff-appellee.

OPINION

FARRIS, Circuit Judge:

Oahu Gas Services, Inc., sued Pacific Resources, Inc., under Section 2 of the Sherman Act for monopolization and attempted monopolization of propane sales in Hawaii. Oahu Gas alleged that Pacific Resources' unlawful conduct included: (1) a decision in 1974 not to begin producing propane and (2) a campaign in 1982 to force Oahu to lower prices by offering sham cut-rate contracts to Oahu's customers. After trial, a jury found in favor of Oahu and awarded treble damages of $4,963,998.00. Pacific Resources appeals the

denial of its motion for judgment notwithstanding the verdict.

BACKGROUND

Until 1972, Gasco, a subsidiary of Pacific Resources, was the sole retail seller of propane gas in Hawaii. It received virtually all its propane from Chevron, which operated the only propane refinery in Hawaii. In 1972, Oahu Gas Service was formed and began selling propane on Oahu. Its propane supplies also came from Chevron. Beginning in 1973, the federal government controlled the price and allocation of propane. The base period for determining allocations was May 1972, before Oahu Gas had begun business. Oahu therefore had to apply to the Department of Energy for a "base period volume" of propane that Chevron would be required to supply.

During the energy crisis, price controls on domestically produced propane led Chevron to produce the minimum required by the Department of Energy. Gasco bought increasing amounts of propane from foreign suppliers. During these years, Oahu Gas repeatedly applied to the Department of Energy for larger allocations of propane. Gasco opposed these applications because giving Oahu more low-cost domestic propane would require Gasco to buy more expensive foreign propane, thus increasing Oahu's cost advantage. The Department of Energy denied Oahu's requests until, in July 1979, the Department increased Oahu's share of domestic propane on the condition that Oahu pay Gasco $163,108.00 to offset some of Gasco's additional costs for importing more foreign propane.

One basis for Oahu's Sherman Act allegations was the decision of Hawaiian Independent Refinery, Inc. — a subsidiary of Pacific Resources — not to produce propane in the 1970s. Hawaiian Independent Refinery began operating a petroleum refinery in 1972, producing chiefly military fuels. In early

the market on Oahu declined steadily. By 1983, before the trial, Oahu sold about 30% of the propane in Oahu. Oahu Gas dominated sales to high-volume commercial and industrial users on Oahu, supplying 78% of that sub-market in 1985. Gasco supplied about 20% of those customers; Aloha Gas supplied the remaining 2%. Oahu Gas did not sell propane in the outer islands.

Oahu's claims of monopolization and attempted monopolization went to trial in 1985. The jury returned a verdict in favor of Oahu and found treble damages of $4,963,998.00. The court also awarded attorneys fees of $873,324.00.

DISCUSSION

1. *Monopoly Power in the Relevant Market*

[1] The offense of monopolization under Section 2 of the Sherman Act has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); *see also Catlin v. Washington Energy Co.*, 791 F.2d 1343, 1347 (9th Cir. 1986) (making explicit as a third factor the implicit requirement of "causal antitrust injury"). The jury found that Gasco had monopoly power in the relevant market from 1972 to 1982, when its alleged exclusionary conduct took place. Because Pacific Resources is appealing from the denial of a motion for judgment notwithstanding the verdict, we review the evidence on this factual issue in the light most favorable to Oahu and draw all reasonable inferences in Oahu's favor. *Peterson v. Kennedy*, 771 F.2d 1244, 1252 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 1642 (1986); *see also Forro Precision, Inc. v. I.B.M. Corp.*, 673 F.2d 1045, 1058 (9th Cir. 1982) (describing the standard of review for a motion to direct verdict, which is the same as the standard for JNOV). "A JNOV is

improper if reasonable minds could differ over the verdict." *Peterson*, 771 F.2d at 1252.

There is no question that Gasco, a subsidiary of Pacific Resources, distributed 100% of Hawaii's propane in 1972, before Oahu Gas entered the market. Gasco is still the only supplier of propane on the outer islands. Pacific Resources contends, however, that the decline of Gasco's market share after Oahu entered the market and Aloha's entry into the market show that Gasco did not have monopoly power. Pacific Resources also contends that the relevant market consists of large-scale consumers of propane on Oahu, rather than the whole propane market. If so, Oahu Gas actually had a much larger share of that "submarket" by 1985 than did Gasco.

Determining the relevant market typically requires an inquiry into the nature of the product, *see, e.g., United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 391 (1956), and the geographical area of effective competition. *United States v. Grinnell*, 384 U.S. at 575-76. Determining the existence of monopoly power in the particular market usually depends on market share and barriers to entry, but the inquiry focuses more generally on the power to "control prices or exclude competition." *U.S. v. duPont*, 351 U.S. at 391. The factors to consider may vary from case to case, so no one factor is determinative: "Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, 'proof of actual detrimental effects, such as reduction of output' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effect.' " *FTC v. Indiana Federation of Dentists*, 106 S. Ct. 2009, 2019 (1986).

[2] The jury's finding that Gasco had monopoly power in the whole Hawaiian propane market is consistent with the Court's view that monopoly power involves "the potential for

genuine adverse effects on competition." That Gasco completely dominates Hawaii's outer islands is evidence supporting the jury's finding of monopoly power. Evidence about the difficulty of entry to the propane market also supports the jury's finding. The jury could reasonably have concluded that Oahu's success in capturing a significant market share on Oahu may have been due to the "insider" status of its founder, once an executive with Gasco, who took some large accounts with him when he left Gasco. The only other new entrant to the market, Aloha Gas, has remained very small. Viewing all this evidence in the light most favorable to Oahu, we hold that the jury could reasonably conclude that Gasco had monopoly power in the relevant market.[1]

2. *The Decision Not to Expand the Refinery*

The second element of monopolization under Section 2 of the Sherman Act is "the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *U.S. v. Grinnell*, 384 U.S. at 570-71; *see also Catlin v. Washington Energy*, 791 F.2d at 1347. The jury was asked to determine whether "business acumen" or anticompetitive, exclusionary motives lay behind Pacific Resources' 1972 decision not to modify its Hawaiian Refinery to permit propane production. Whether particular conduct is anticompetitive under the Sherman Act is a question of law that we review *de novo*. *Western Concrete Structures Co. v. Mitsui & Company (U.S.A.), Inc.*, 760 F.2d 1013, 1016 (9th Cir.), *cert. denied*, 106 S. Ct. 230 (1985).

The factual questions about Pacific Resources' allegedly exclusionary conduct in the early 70s were resolved at trial. It was clear that expanding the refinery to permit propane pro-

[1]Because we uphold the jury's finding of monopoly power, we need not consider the attempted monopolization claim that was an alternative ground for the jury's verdict.

duction would have been uneconomical under federal price controls in place at the time. It was also clear, however, that the decision not to produce propane had been based not only on economic factors but also on a desire to restrict the supply of propane potentially available to Oahu Gas. There is evidence in the record that the management of Pacific Resources worried that increasing the supply of propane in Hawaii would result in Oahu's getting more propane to sell, increasing its market share.

The desire to maintain or increase one's market share is not in itself an antitrust violation, of course. Nor is a decision to forego the production of propane an illegal act *per se*. But a monopolist must take care that otherwise lawful acts do not have anticompetitive effects because of its monopoly power. We therefore reject Pacific Resources' broad contention that the antitrust laws may never impose duties on a monopolist to aid its competitors. Because of a monopolist's special position the antitrust laws impose what may be characterized as affirmative duties.[2]

[3] Instead of focusing on affirmative duties or on acts versus omissions, we determine antitrust liability by asking whether Pacific Resources' decision "unnecessarily excluded competition." *Greyhound Computer Corp. v. I.B.M. Corp.*, 559 F.2d 488, 498 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978). Because producing propane would have been uneconomical at the time, Pacific Resources' decision to forego propane production did not exclude competition *unnecessarily*. The economic rationale, even if not the only rationale for the decision, excluded competition *necessarily*. Economic necessity distinguishes this conduct from "willful acquisition or

[2]For example, a ski resort with monopoly power was required to continue a marketing arrangement with its small neighbor where that arrangement increased competition, benefited consumers, and was not uneconomical for the monopolist. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

maintenance of [monopoly] power," *U.S. v. Grinnell*, 384 U.S. at 570-71, because it involved the "business acumen" that *Grinnell* specifically exempts from antitrust liability. *Id.* The jury was improperly given an either/or choice. It was told that it could decide whether Pacific Resources' decision was based on economic motives *or* on a desire to maintain its market share.[3] It should have been instructed that the desire to maintain market power — even a monopolist's market power — cannot create antitrust liability if Pacific Resources' production of propane would have been uneconomical.

Two lines of cases support our holding, though they are not directly controlling. A line of "product innovation" cases has consistently rejected antitrust liability for a monopolist's decision about when or whether to market new products. *See, e.g., Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 545 (9th Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984); *California Computer Products v. I.B.M. Corp.*, 613 F.2d 727 (9th Cir. 1979); *see also GAF Corporation v. Eastman Kodak Co.*, 519 F. Supp. 1203, 1232 (S.D.N.Y. 1981) ("no court has yet found a monopolist's failure to market a product as satisfying § 2's conduct requirement."). These cases, involving technological innovations, have held that the contested marketing decisions derived from "a superior product," and are therefore exempt from antitrust liability. Oahu Gas contends that such cases are inapposite, because the product at issue here is propane, hardly an innovation. But "business

[3]The jury instruction on this issue was as follows:

> To sum up, you must determine whether PRI and Gasco maintained monopoly power in a relevant market by policies and conduct which were not legitimate business decisions but were instead designed primarily to further any domination of a relevant market. . . .
>
> You should seek to determine if the challenged conduct is supported by legitimate business reasons *or* whether it was a deliberate effort to injure a smaller rival which caused defendants to sacrifice short-run benefits and consumer good will.

acumen" — the economics of timing a technological innovation — is also an aspect of these cases. In *California Computer* we specifically addressed the issue of when a question of legitimate business purpose may go to a jury. Where IBM redesigned products in such a way that they were incompatible with a competitor's products, and where such design changes were justified "by reason of lower manufacturing cost and price or improved performance[,] . . . [t]he reasonableness of IBM's conduct . . . did not present a jury issue." *California Computer Products*, 613 F.2d at 744.

Another line of cases that Oahu asks us to consider are "supply restriction" cases. Oahu contends that Pacific Resources impermissibly sought to restrict the supply of propane in the Hawaiian Islands. *See, e.g., NCAA v. Board of Regents*, 468 U.S. 85 (1984); *Litton Systems, Inc. v. AT&T*, 700 F.2d 785 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984); *Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976). A theory of liability based on "supply restriction" must fail because Pacific Resources had no monopoly power over *supplies* of propane to Hawaii. Chevron produced all Hawaiian propane until 1982.[4] Contrary to Oahu's argument, the regulatory scheme in place in the 70s did not give Pacific Resources control over propane supplies. Oahu appealed to the Department of Energy for larger allocations of propane, and it was ultimately successful. Oahu's supply restriction theory cannot support antitrust liability for Pacific Resources' decision not to produce propane.

As a matter of law, therefore, we reverse the judgment of antitrust liability based on the refinery episode.

[4]For this reason the "essential facilities" theory would not apply either. *See MCI Communications Corp. v. AT&T Co.*, 708 F.2d 1081, 1132 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983) (plaintiff must show control of the essential facility by a monopolist).

3. *Gasco's 1982 Marketing Campaign*

The jury found that Gasco's 1982 campaign to offer cut-rate contracts to large propane purchasers was anticompetitive and predatory. Pacific Resources contends that its offers of lower prices were *per se* lawful because they were above average total cost. *See California Computer*, 613 F.2d at 740-42 (finding no antitrust liability where IBM's lower prices were "cost-justified" even though they had the express purpose of forcing competitors to lower prices and lose profits). Oahu concedes that the prices Gasco offered were above average total cost, but argues that they are nonetheless predatory because Gasco's rationale was "to discipline or eliminate competition and thereby enhance the firm's long-term ability to reap the benefits of monopoly power." *Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1035 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982).

[4] At trial, a plaintiff in Oahu's position must show by "clear and convincing evidence" that the defendant's pricing policy had a predatory rationale. *Airweld, Inc. v. Airco, Inc.*, 742 F.2d 1184, 1193 (9th Cir. 1984), *cert. denied*, 469 U.S. 1213 (1985). We review the evidence on this factual issue in the light most favorable to Oahu and draw all reasonable inferences in Oahu's favor. *See Peterson v. Kennedy*, 771 F.2d at 1252. "A JNOV is improper if reasonable minds could differ over the verdict." *Id.* We may infer from the jury's verdict that it found the evidence about the 1982 marketing campaign "clear and convincing." The relevant evidence is not the prices Gasco offered. In the typical predatory price-cutting campaign, a monopolist is willing to risk losses in the short-run to eliminate a competitor. If Oahu's allegations are true, however, Gasco was not taking such a risk because the cut-rate contracts it offered were shams. The relevant evidence, therefore, is the contracts themselves and the testimony about how those contracts were offered to customers of Gasco and Oahu.

[5] The evidence reasonably supports the jury's finding of a predatory rationale in the 1982 marketing campaign. The jury may be presumed to have accepted Oahu's claim that the cut-rate contracts were "shams," and evidence in the record supports this claim. Most of the Oahu Gas customers solicited by Gasco were known to have had long-term contracts with Oahu that they would be unlikely to break. A Gasco employee testified that when making the offer to an Oahu customer, she invited the customer to ask Oahu to meet or beat the offered price cut. The jury may also be presumed to have found credible Oahu's evidence that Gasco did not make the same offers to its own customers as it did to Oahu's customers. On this record, the trial court's denial of the JNOV was not improper. We therefore affirm that portion of the judgment based on the jury's finding that Gasco's marketing campaign in 1982 was anticompetitive and predatory under Section 2 of the Sherman Act.

4. *Damages*

[6] Because we partially reverse the judgment, the district court, on remand, must strike the damages based on the refinery episode. As for the damages based on the 1982 marketing campaign, we must affirm that portion of the award unless it is clearly unsupported by the evidence. *Chalmers v. City of Los Angeles*, 762 F.2d 753, 760 (9th Cir. 1985); *see also, Moore v. Jas. H. Matthews & Co.*, 682 F.2d 830, 836 (9th Cir. 1982) ("[A]n antitrust plaintiff is only obligated to provide the trier-of-fact with some basis from which to estimate reasonably, and without undue speculation, the damages flowing from the antitrust violations.").

Damages flowing from the 1982 marketing campaign were fixed at $421,481.00, before trebling. This was the amount Oahu lost due to the reduced prices it gave from April 30, 1982, through November 30, 1983, to those customers who were solicited for cut-rate contracts by Gasco. Pacific Resources contends that its actions did not cause Oahu's

losses. It argues that with the June 1982 injunction against Gasco's campaign, Oahu need not have kept its prices lowered. Any losses from reduced prices after June 30, 1982, were therefore voluntary. Whether Oahu was able to raise its prices again immediately after the injunction is an issue of fact that the jury resolved against Pacific Resources. We do not find this conclusion clearly erroneous and therefore affirm the amount of damages based on the marketing campaign.

Because our partial reversal will reduce the overall damage award, the district court on remand must also recalculate the amount of the award for attorney's fees.

Affirmed in part, reversed in part, and remanded for adjustment of damages and attorney's fees in accordance with this opinion.

OAHU GAS SERVICE, INC. v. PACIFIC RESOURCES INC.

CITE AS: 829 F.2d 1471 (9th Cir. 1987)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OAHU GAS SERVICE, INC.,
Plaintiff-Appellee,

v.

PACIFIC RESOURCES INC., GASCO, INC.,
Defendants-Appellants.

No. 86-2250

D.C. . No. CV-77-0444-PGR

AMENDED OPINION

Appeal from the United States District Court
for the District of Hawaii
Paul G. Rosenblatt, District Judge, Presiding

Argued and Submitted
August 10, 1987—San Francisco, California

Decided October 9, 1987
Amended November 27, 1987

Before: Eugene A. Wright, Jerome Farris and David R. Thompson, Circuit Judges.

Opinion by Judge Farris

SUMMARY

Antitrust

Appeal from judgment. Affirmed in part, reversed in part, remanded in part.

Appellants Gasco, a subsidiary of Pacific Resources, was the sole retail seller of propane gas in Hawaii. In 1972, appel-

lee Oahu Gas Service began selling propane on Oahu. Both of their propane supplies came from Chevron. During the energy crisis, price controls on domestically produced propane led Chevron to produce the minimum required by the Department of Energy. Gasco bought increasing amounts of propane from foreign suppliers. Oahu Gas repeatedly applied to, and finally received from, the Department for larger allocation of propane. One basis for Oahu's Sherman Act allegations was the decision of Hawaiian Independent Refinery, Inc., a subsidiary of Pacific Resources, not to produce propane in the 1970s. The refinery expanded only to permit gasoline production. After price controls ended, the refinery was modified to produce propane. Another basis for Oahu's allegations was Gasco's marketing program in 1982. With the end of regulation, Gasco began a marketing program that included offers of low-cost long-term contracts to large-volume purchasers, both its own customers and Oahu Gas customers. Oahu asserted at trial that the offers were "shams," designed to force Oahu to cut prices to its own customers. Oahu sought and obtained an injunction prohibiting Gasco from soliciting Oahu's customers while they were under contract to Oahu. Oahu's claims of monopolization and attempted monopolization went to trial. The jury returned a verdict in favor of Oahu and found treble damages and awarded attorneys fees.

[1] The offense of monopolization under Section 2 of the Sherman Act has two elements: the possession of monopoly power in the relevant market and the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product or business acumen. [2] The jury's finding that Gasco had monopoly power in the whole Hawaiian propane market is consistent with the Court's view that monopoly power involves the potential for genuine adverse effects on competition. [3] This court determines antitrust liability by asking whether Pacific Resources' decision not to expand its refinery unnecessarily excluded competition. Because producing propane would

have been uneconomical at the time, Pacific Resources' decision to forego propane production did not exclude competition *unnecessarily*. [4] At trial, a plaintiff in Oahu's position must show by clear and convincing evidence that the defendant's pricing policy had a predatory rationale. The evidence is not the prices Gasco offered, it's the contracts themselves and how they were offered to customers. [5] The jury may be presumed to have accepted Oahu's claim that the cut-rate contracts were "shams," and evidence in the record supports this claim. [6] Because this court partially reverses the judgment, the district court, on remand, must strike the damages based on the refinery episode. As for the damages based on the 1982 marketing campaign, this court affirms.

COUNSEL

William S. Boyd, San Francisco, California, for the defendants-appellants.

Maxwell Blecher, Los Angeles, California, for the plaintiff-appellee.

OPINION

FARRIS, Circuit Judge:

Oahu Gas Services, Inc., sued Pacific Resources, Inc., under Section 2 of the Sherman Act for monopolization and attempted monopolization of propane sales in Hawaii. Oahu Gas alleged that Pacific Resources' unlawful conduct included (1) a decision in 1974 not to begin producing propane and (2) a campaign in 1982 to force Oahu to lower prices by offering sham cut-rate contracts to Oahu's customers. After trial, a jury found in favor of Oahu and awarded treble damages of $4,963,998.00. Pacific Resources appeals the

denial of its motion for judgment notwithstanding the verdict.

BACKGROUND

Until 1972, Gasco, a subsidiary of Pacific Resources, was the sole retail seller of propane gas in Hawaii. It received virtually all its propane from Chevron, which operated the only propane refinery in Hawaii. In 1972, Oahu Gas Service was formed and began selling propane on Oahu. Its propane supplies also came from Chevron. Beginning in 1973, the federal government controlled the price and allocation of propane. The base period for determining allocations was May 1972, before Oahu Gas had begun business. Oahu therefore had to apply to the Department of Energy for a "base period volume" of propane that Chevron would be required to supply.

During the energy crisis, price controls on domestically produced propane led Chevron to produce the minimum required by the Department of Energy. Gasco bought increasing amounts of propane from foreign suppliers. During these years, Oahu Gas repeatedly applied to the Department of Energy for larger allocations of propane. Gasco opposed these applications because giving Oahu more low-cost domestic propane would require Gasco to buy more expensive foreign propane, thus increasing Oahu's cost advantage. The Department of Energy denied Oahu's requests until, in July 1979, the Department increased Oahu's share of domestic propane on the condition that Oahu pay Gasco $163,108.00 to offset some of Gasco's additional costs for importing more foreign propane.

One basis for Oahu's Sherman Act allegations was the decision of Hawaiian Independent Refinery, Inc. — a subsidiary of Pacific Resources — not to produce propane in the 1970s. Hawaiian Independent Refinery began operating a petroleum refinery in 1972, producing chiefly military fuels. In early

1973, before price controls went into effect, Hawaiian planned to modify its refinery to permit production of propane and gasoline. The plans assumed that the modifications could be completed by 1976 and that Gasco would be the chief customer for propane. Under price controls, however, Hawaiian's propane would have had the same ceiling price as Chevron's. Thus the refinery expanded only to permit gasoline production, which began in May 1975. After price controls ended in 1981, the refinery was modified to produce propane. It has sold propane to Gasco and to Aloha Gas, a small new propane distributor. It has expressed a willingness to sell propane to Oahu Gas.

Another basis for Oahu's allegations was Gasco's marketing program in 1982. During the energy crisis, demand for propane fell as consumers turned to alternative energy sources. With the end of regulation in 1981 and the beginning of propane production at Hawaiian's refinery in 1982, propane supplies became more plentiful. Gasco began a marketing program in 1982 that included offers of low-cost long-term contracts to large-volume purchasers, both its own customers and customers served by Oahu Gas. The prices offered were above Gasco's average total cost of supplying propane, but Oahu asserted at trial that the offers were "shams," designed to force Oahu to cut prices to its own customers. Oahu did cut prices to those customers, resulting in such low profits, Oahu claims, that it was nearly put out of business. None of Oahu's customers accepted Gasco's offers. Several of Gasco's own customers accepted the offers. In June 1982, Oahu sought and obtained an injunction prohibiting Gasco from soliciting Oahu's customers while they were under contract to Oahu.

The record indicates several uncontroverted facts relating to the relevant market and market shares of Gasco and Oahu Gas. Before Oahu began business in 1972, Gasco served 100% of the propane market on Oahu and in the "outer islands." After Oahu Gas began operating, Gasco's share of

the market on Oahu declined steadily. By 1983, before the trial, Oahu sold about 30% of the propane in Oahu. Oahu Gas dominated sales to high-volume commercial and industrial users on Oahu, supplying 78% of that sub-market in 1985. Gasco supplied about 20% of those customers; Aloha Gas supplied the remaining 2%. Oahu Gas did not sell propane in the outer islands.

Oahu's claims of monopolization and attempted monopolization went to trial in 1985. The jury returned a verdict in favor of Oahu and found treble damages of $4,963,998.00. The court also awarded attorneys fees of $873,324.00.

DISCUSSION

1. *Monopoly Power in the Relevant Market*

[1] The offense of monopolization under Section 2 of the Sherman Act has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); *see also Catlin v. Washington Energy Co.*, 791 F.2d 1343, 1347 (9th Cir. 1986) (making explicit as a third factor the implicit requirement of "causal antitrust injury"). The jury found that Gasco had monopoly power in the relevant market from 1972 to 1982, when its alleged exclusionary conduct took place. Because Pacific Resources is appealing from the denial of a motion for judgment notwithstanding the verdict, we review the evidence on this factual issue in the light most favorable to Oahu and draw all reasonable inferences in Oahu's favor. *Peterson v. Kennedy*, 771 F.2d 1244, 1252 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 1642 (1986); *see also Forro Precision, Inc. v. IBM Corp.*, 673 F.2d 1045, 1058 (9th Cir. 1982) (describing the standard of review for a motion to direct verdict, which is the same as the standard for JNOV). "A JNOV is

improper if reasonable minds could differ over the verdict." *Peterson*, 771 F.2d at 1252.

There is no question that Gasco, a subsidiary of Pacific Resources, distributed 100% of Hawaii's propane in 1972, before Oahu Gas entered the market. Gasco is still the only supplier of propane on the outer islands. Pacific Resources contends, however, that the decline of Gasco's market share after Oahu entered the market and Aloha's entry into the market show that Gasco did not have monopoly power. Pacific Resources also contends that the relevant market consists of large-scale consumers of propane on Oahu, rather than the whole propane market. If so, Oahu Gas actually has a much larger share of that "submarket" by 1985 than did Gasco.

Determining the relevant market typically requires an inquiry into the nature of the product, *see, e.g., United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 391 (1956), and the geographical area of effective competition. *United States v. Grinnell*, 384 U.S. at 575-76. Determining the existence of monopoly power in the particular market usually depends on market share and barriers to entry, but the inquiry focuses more generally on the power to "control prices or exclude competition." *U.S. v. duPont*, 351 U.S. at 391. The factors to consider may vary from case to case, so no one factor is determinative: "Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine advers effects on competition, 'proof of actual detrimental effects, such as reduction of output' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effect.' " *F.T.C. v. Indiana Federation of Dentists*, 106 S. Ct. 2009, 2019 (1986).

[2] The jury's finding that Gasco had monopoly power in the whole Hawaiian propane market is consistent with the Court's view that monopoly power involves "the potential for

genuine adverse effects on competition." That Gasco completely dominates Hawaii's outer islands is evidence supporting the jury's finding of monopoly power. Evidence about the difficulty of entry to the propane market also supports the jury's finding. The jury could reasonably have concluded that Oahu's success in capturing a significant market share on Oahu may have been due to the "insider" status of its founder, once an executive with Gasco, who took some large accounts with him when he left Gasco. The only other new entrant to the market, Aloha Gas, has remained very small. Viewing all this evidence in the light most favorable to Oahu, we hold that the jury could reasonably conclude that Gasco had monopoly power in the relevant market.[1]

2. *The Decision Not to Expand the Refinery*

The second element of monopolization under Section 2 of the Sherman Act is "the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell*, 384 U.S. at 570-71; *see also Catlin v. Washington Energy*, 791 F.2d at 1347. The jury was asked to determine whether legitimate business reasons or anticompetitive, exclusionary motives lay behind Pacific Resources' 1972 decision not to modify its Hawaiian refinery to permit propane production. Whether specific conduct is anticompetitive under the Sherman Act is a question of law that we review *de novo*. *Western Concrete Structures Co. v. Mitsui & Company (U.S.A.), Inc.*, 760 F.2d 1013, 1016 (9th Cir.), *cert. denied*, 474 U.S. 903 (1985).

[3] The factual questions about Pacific Resources' allegedly exclusionary conduct in the early 70s were resolved at trial. It was clear that expanding the refinery to permit propane pro-

[1] Because we uphold the jury's finding of monopoly power, we need not consider the attempted monopolization claim that was an alternative ground for the jury's verdict.

duction would have been uneconomical under federal price controls in place at the time. It was also clear, however, that the decision not to produce propane had been based not only on economic factors but also on a desire to restrict the supply of propane potentially available to Oahu Gas. There is evidence in the record that the management of Pacific Resources feared that increasing the supply of propane in Hawaii would result in Oahu's getting more propane to sell, increasing its market share.

The desire to maintain or increase one's market share is not in itself an antitrust violation, of course. Nor is a decision to forego the production of propane an illegal act *per se*. But a monopolist must take care that otherwise lawful acts do not have anticompetitive effects because of its monopoly power.

We therefore reject Pacific Resources' broad contention that the antitrust laws may never impose duties on a monopolist to aid its competitors. Because of a monopolist's special position the antitrust laws impose what may be characterized as affirmative duties.[2] These duties are not absolute, however; they arise only when there is no justification for refusing to aid a competitor.

[4] Where a monopolist's refusal to aid a competitor is based partially on a desire to restrict competition, we determine antitrust liability by asking whether there was a legitimate business justification for the monopolist's conduct. *See Aspen Skiing Co. v. Aspen Highland Skiing Corp.*, 472 U.S. 585 (1985); *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1478 (9th Cir. 1986); *Drinkwine v. Federated Publications, Inc.*, 780 F.2d 735, 740 (9th Cir.), *cert. denied*, 106 S. Ct. 1471 (1986).

[2] For example, a ski resort with monopoly power was required to continue a marketing arrangement with its small neighbor where there was no legitimate business justification for discontinuing it, and the arrangement increased competition and benefited consumers. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

[5] The investment required of Pacific Resources to produce propane would have resulted in a negative return. In light of the then-existing price controls, it was not economically efficient for Pacific Resources to invest its resources in propane production. The decision to forego propane production did not exclude competition unnecessarily. The economic rationale, even if not the only rationale for the decision, excluded competition necessarily. Economic necessity distinguished this conduct from "willful acquisition or maintenance of [monopoly] power," *United States v. Grinnell*, 384 U.S. at 570-71, because it involved the 'business acumen' that *Grinnell* specifically exempts from antitrust liability. *Id.*

The jury was instructed improperly. It was given an either/or choice: it could decide whether Pacific Resources' decision was based on economic motives *or* on a desire to maintain its market share.[3] It should have been instructed that the desire to maintain market power — even a monopolist's market power — cannot create antitrust liability if there was a legitimate business justification for refusing to produce propane.

Two lines of cases support our holding, though they are not directly controlling. A line of "product innovation" cases has consistently rejected antitrust liability for a monopolist's decision about when or whether to market new products. *See, e.g., Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d

[3] The jury instruction on this issue was:

> To sum up, you must determine whether PRI and Gasco maintained monopoly power in a relevant market by policies and conduct which were not legitimate business decisions but were instead designed primarily to further any domination of a relevant market. . . .
>
> You should seek to determine if the challenged conduct is supported by legitimate business reasons *or* whether it was a deliberate effort to injure a smaller rival which caused defendants to sacrifice short-run benefits and consumer good will.

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534, 545 (9th Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984); *California Computer Products v. I.B.M. Corp.*, 613 F.2d 727 (9th Cir. 1979); *see also GAF Corporation v. Eastman Kodak Co.*, 519 F. Supp. 1203, 1232 (S.D.N.Y. 1981) ("[N]o court has yet found a monopolist's failure to market a product as satisfying § 2's conduct requirement.").

These cases, involving technological innovations, have held that the contested marketing decisions derived from "a superior product", and are therefore exempt from antitrust liability. Oahu Gas contends that such cases are inapposite, because the product at issue here is propane, hardly an innovation. But business acumen — the economics of timing a technological innovation — is also an aspect of these cases.

In *California Computer* we addressed specifically the issue of when a question of legitimate business purpose may go to a jury. Where IBM redesigned products in such a way that they were incompatible with a competitor's product, and where such design changes were justified "by reason of lower manufacturing cost and price or improved performance[,] . . . [t]he reasonableness of IBM's conduct . . . did not present a jury issue." *California Computer Products*, 613 F.2d at 744.

Another line of cases that Oahu asks us to consider are "supply restriction" cases. It contends that Pacific Resources impermissibly sought to restrict the supply of propane in the Hawaiian Islands. *See, e.g., NCAA v. Board of Regents*, 468 U.S. 85 (1984); *Litton Systems, Inc. v. AT&T*, 700 F.2d 785 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984); *Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976). A theory of liability based on "supply restriction" must fail because Pacific Resources had no monopoly power over supplies of propane to Hawaii. Chevron produced all Hawaiian propane until 1982.[4] Contrary to Oahu's argument, the regu-

[4]For this reason the "essential facilities" theory would not apply either. *See MCI Communications Corp. v. AT&T Co.*, 708 F.2d 1081, 1132 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983) (plaintiff must show control of the essential facility by a monopolist).

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latory scheme in place in the 70s did not give Pacific Resources control over propane supplies. Oahu appealed to the Department of Energy for larger allocations of propane, and it was ultimately successful. Oahu's supply restriction theory cannot support antitrust liability for Pacific Resources' decision not to produce propane.

As a matter of law, we reverse the judgment of antitrust liability based on the refinery episode. Pacific Resources' decision to refrain from producing propane because it was not economically efficient is sufficient justification to preclude antitrust liability.

3. *Gasco's 1982 Marketing Campaign*

The jury found that Gasco's 1982 campaign to offer cut-rate contracts to large propane purchasers was anticompetitive and predatory. Pacific Resources contends that Gasco "had the absolute right to offer reduced prices so long as those offers were not shown to be below costs or shown to be predatory by clear and convincing evidence." Oahu, on the other hand, maintains that Pacific's "efforts to fit their 'blitzkrieg' conduct into a predatory pricing mold must be rejected," because Gasco "made false 'offers' without ever intending to compete for that business."

In reviewing this denial of a motion for a judgment notwithstanding the verdict, we must take the factual evidence in the light most favorable to Oahu and draw all reasonable inferences in Oahu's favor. *See Peterson v. Kennedy*, 771 F.2d at 1252. "A JNOV is improper if reasonable minds could differ over the verdict." *Id.*

[6] Applying these guidelines to the jury's findings, we conclude that the court was justified in denying the JNOV motion. Pacific's argument that the evidence could not reasonably support a claim for predatory pricing, though accurate, is misplaced. This is not a predatory pricing case. The

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evidence relevant to the finding of predatory conduct in this case is not the prices Gasco offered. It is the contracts themselves and the testimony about how those contracts were offered to customers of Gasco and Oahu. In the case of predatory pricing, a monopolist is willing to risk losses in the short-run to eliminate a competitor. In this case, however, the jury may be presumed to have accepted Oahu's claim that Gasco was not taking such a risk because the cut-rate contracts it offered were "shams."

Under Section 2 of the Sherman Act, any conduct that "is not true competition" and "makes sense only because it eliminates competition" is forbidden. If conduct by a monopolist "does not enhance the quality of attractiveness of the product, reduce its cost, or alter the demand function that all competitors confront," and is driven by a purpose "to create a monopoly by means other than fair competition," it violates section two. *William Inglis, Etc. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1030-31 (9th Cir. 1981); *see* 3 P. Areeda & D. Turner, Antitrust Law ¶ 738a (1978). Fraudulent offers of cut-rate prices whose only rationale is a desire to drive rivals out of the market is exclusionary conduct within this definition.

Our review of the record convinces us that the evidence reasonably supported the jury's finding of a predatory rationale in the 1982 marketing campaign. Most of the Oahu Gas customers solicited by Gasco were known to have had long-term contracts with Oahu that they would be unlikely to break. A Gasco employee testified that when making the offer to an Oahu customer, she invited the customer to ask Oahu to meet or beat the offered price cut. The jury may also be presumed to have found credible Oahu's evidence that Gasco did not make the same offers to its own customers as it did to Oahu's customers.

On this record, the trial court's denial of the JNOV was not improper. We affirm that portion of the judgment based on

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the jury's finding that Gasco's marketing campaign in 1982 was anticompetitive and predatory under Section 2 of the Sherman Act.

4. *Damages*

Because we partially reverse the judgment, the district court, on remand, must strike the damages based on the refinery episode. As for the damages based on the 1982 marketing campaign, we must affirm that portion of the award unless it is clearly unsupported by the evidence. *Chalmers v. City of Los Angeles*, 762 F.2d 753, 760 (9th Cir. 1985); *see also, Moore v. Jas. H. Matthews & Co.*, 682 F.2d 830, 836 (9th Cir. 1982) ("[A]n antitrust plaintiff is only obligated to provide the trier-of-fact with some basis from which to estimate reasonably, and without undue speculation, the damages flowing from the antitrust violations.").

Damages flowing from the 1982 marketing campaign were fixed at $421,481.00, before trebling. This was the amount Oahu lost due to the reduced prices it gave from April 30, 1982, through November 30, 1983, to those customers who were solicited for cut-rate contracts by Gasco. Pacific Resources contends that its actions did not cause Oahu's losses. It argues that with the June 1982 injunction against Gasco's campaign, Oahu need not have kept its prices lowered. Any losses from reduced prices after June 30, 1982, were therefore voluntary. Whether Oahu was able to raise its prices again immediately after the injunction is an issue of fact that the jury resolved against Pacific Resources. We do not find this conclusion clearly erroneous and therefore affirm the amount of damages based on the marketing campaign.

Because our partial reversal will reduce the overall damage award, the district court on remand must also recalculate the amount of the award for attorney's fees.

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Affirmed in part, reversed in part, and remanded for adjustment of damages and attorney's fees in accordance with this opinion

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OAHU GAS SERVICE, INC. v. PACIFIC RESOURCES INC.

CITE AS: 838 F.2d 360 (9th Cir. 1988)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OAHU GAS SERVICE, INC.,
Plaintiff-Appellee,

v.

PACIFIC RESOURCES INC., GASCO, INC.,
Defendants-Appellants.

No. 86-2250

D.C. No. CV-77-0444-PGR

ORDER AND OPINION

Appeal from the United States District Court
for the District of Hawaii
Paul G. Rosenblatt, District Judge, Presiding

Argued and Submitted
August 10, 1987—San Francisco, California

Order and Opinion Filed February 1, 1988

Before: Eugene A. Wright, Jerome Farris and David R. Thompson, Circuit Judges.

Opinion by Judge Farris

SUMMARY

Antitrust

Appeal from judgment. Reversed.

The court's opinion filed October 9, 1987, and amended November 27, 1987 is withdrawn. Appellant Pacific Resources appeals the denial of its motion for j.n.o.v. Appel-

lant Gasco was the sole retail seller of propane gas in Hawaii. It received virtually all its propane from Chevron, which operated the only propane refinery in Hawaii. Appellee Oahu Gas began selling propane on Oahu. Its propane supplies also came from Chevron. In 1973 the federal government controlled the price and allocation of propane. Oahu had to apply for a base period volume of propane that Chevron would be required to supply. During the energy crisis Gasco bought increasing amounts of propane from foreign suppliers. During these years, Oahu Gas repeatedly applied for larger allocations of propane. Gasco opposed these applications because giving Oahu more low-cost domestic propane would require Gasco to buy more expensive foreign propane. In 1979, Oahu's share of domestic propane was increased on the condition that Oahu pay Gasco to offset some of Gasco's additional costs for importing more foreign propane. One basis for Oahu's Sherman Act allegations was the decision of Hawaiian Independent Refinery, Inc., a subsidiary of Pacific Resources, not to produce propane in the 1970s. Another basis for Oahu's allegations was Gasco's marketing program in 1982. Before Oahu began business in 1972, Gasco served 100% of the propane market on Oahu and in the outer islands. After Oahu Gas began operating, Gasco's share declined steadily. Oahu Gas dominated sales to high-volume commercial and industrial users on Oahu. Oahu Gas did not sell propane in the outer islands. Oahu's claims of monopolization and attempted monopolization went to trial. The jury returned a verdict in favor of Oahu.

[1] The first element of the offense of monopolization is the possession of monopoly power in the relevant market. [2] In this determination of the relevant market, the court focused on product definition first. [3] Three plausible product markets were suggested by the parties as the proper subjects of focus for purposes of this court's antitrust inquiry. [4] If the evidence was sufficient to allow a reasonable jury to define the relevant market for antitrust purposes in terms of propane distribution in Hawaii, this court is required to accept the

jury's factfinding on this issue. [5] Unfortunately, review of the evidence does not shed light on the proper market definition. The jury did hear testimony from Oahu's expert, Dr. Meier. Dr. Meier may have opened the door inadvertently to a logical inference in favor of a narrow market definition. [6] This narrow definition also finds support in other materials relied upon by Oahu. [7] Viewing the evidence from this perspective, the jury acted reasonably in concluding that the relevant market included commercial and residential propane, but not other sources of energy. [8] As to geography, based on the evidence, the jury could reasonably have defined the geographical market for propane to include the outer islands. Thus, the jury's definition of the geographical market to include all of Hawaii is affirmed. [9] The jury found that Gasco possessed monopoly power. Oahu maintains that Gasco's high market share and lack of evidence of meaningful entry by other firms into the Hawaiian propane market support an inference of monopoly power. Gasco maintains that the evidence of its steadily declining market share combined with the absence of evidence of barriers to entry or an ability on Gasco's part to control prices precludes any finding that it possessed monopoly power. [10] Inquiries into the existence of monopoly power focus generally on a firm's ability to control prices or exclude competition. Inquiries in this area often depend upon market share and barriers to entry. [11] Gasco argues that the entry of Oahu and Aloha demonstrated that Gasco lacked the ability to control prices or to exclude new entrants. [12] The evidence supports the conclusion that high barriers to entry existed in the Hawaiian propane market. [13] The second element of monopolization is the willful acquisition or maintenance of monopoly power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. [14] A monopolist must take care that otherwise lawful acts do not have anticompetitive effects because of its monopoly power. [15] This court therefore rejects Pacific Resources' contention that the antitrust laws may never impose duties on a monopo-

list to aid its competitors. These duties arise only when there is no justification for refusing to aid a competitor. [16] Where a monopolist's refusal to aid a competitor is based partially on a desire to restrict competition, antitrust liability is determined by asking whether there was a legitimate business justification for the monopolist's conduct. [17] The decision to forego propane production did not exclude competition unnecessarily. Economic necessity distinguished this conduct from willful acquisition or maintenance of monopoly power. [18] The jury should have been instructed that the desire to maintain market power cannot create antitrust liability if there was a legitimate business justification for refusing to produce propane. [19] Oahu's theory of liability based on supply restrictions fails because Pacific Resources had no monopoly power over supplies of propane to Hawaii. [20] Thus, the judgment of antitrust liability based on the refinery episode is reversed. [21] The jury found that Gasco's offer of cut-rate contracts to large propane purchasers was anticompetitive and predatory. [22] Oahu's claim is that the insincerity or sham nature of Gasco's offers is sufficient to support a finding of predatory conduct. [23] Testimony provides support for an inference that Gasco's true goal was not to attract customers but to cut into Oahu's profits. [24] This sham offer campaign seems to have increased competition in the market by inducing Oahu to lower its prices. [25] A finding of anticompetitive intent will not sustain a Section 2 claim in the face of evidence of procompetitive effects. [26] This analysis should not be taken as an endorsement of Gasco's conduct. [27] Thus the jury's finding of antitrust liability growing out of Gasco's 1982 marketing campaign is reversed.

COUNSEL

William S. Boyd, Brobeck, Phleger & Harrison, San Francisco, California, for the defendants-appellants.

Maxwell Blecher, Blecher, Collins & Weinstein, Los Angeles, California, for the plaintiff-appellee.

ORDER

The Opinion filed October 9, 1987 and amended November 27, 1987 is withdrawn.

OPINION

FARRIS, Circuit Judge:

Oahu Gas Services, Inc., sued Pacific Resources, Inc., under Section 2 of the Sherman Act for monopolization and attempted monopolization of propane sales in Hawaii. Oahu Gas alleged that Pacific Resources' unlawful conduct included: (1) a decision in 1974 not to begin producing propane and (2) a campaign in 1982 to force Oahu to lower prices by offering sham cut-rate contracts to Oahu's customers. After trial, a jury found in favor of Oahu and awarded treble damages of $4,963,998.00. Pacific Resources appeals the denial of its motion for judgment notwithstanding the verdict.

BACKGROUND

Until 1972, Gasco, a subsidiary of Pacific Resources, was the sole retail seller of propane gas in Hawaii. It received virtually all its propane from Chevron, which operated the only propane refinery in Hawaii. In 1972, Oahu Gas Service was formed and began selling propane on Oahu. Its propane supplies also came from Chevron. Beginning in 1973, the federal government controlled the price and allocation of propane. The base period for determining allocations was May 1972, before Oahu Gas had begun business. Oahu therefore had to

apply to the Department of Energy for a "base period volume" of propane that Chevron would be required to supply.

During the energy crisis, price controls on domestically produced propane led Chevron to produce the minimum required by the Department of Energy. Gasco bought increasing amounts of propane from foreign suppliers. During these years, Oahu Gas repeatedly applied to the Department of Energy for larger allocations of propane. Gasco opposed these applications because giving Oahu more low-cost domestic propane would require Gasco to buy more expensive foreign propane, thus increasing Oahu's cost advantage. The Department of Energy denied Oahu's requests until, in July 1979, the Department increased Oahu's share of domestic propane on the condition that Oahu pay Gasco $163,108.00 to offset some of Gasco's additional costs for importing more foreign propane.

One basis for Oahu's Sherman Act allegations was the decision of Hawaiian Independent Refinery, Inc. — a subsidiary of Pacific Resources — not to produce propane in the 1970s. Hawaiian Independent Refinery began operating a petroleum refinery in 1972, producing chiefly military fuels. In early 1973, before price controls went into effect, Hawaiian planned to modify its refinery to permit production of propane and gasoline. The plans assumed that the modifications could be completed by 1976 and that Gasco would be the chief customer for propane. Under price controls, however, Hawaiian's propane would have had the same ceiling price as Chevron's. Thus the refinery expanded only to permit gasoline production, which began in May 1975. After price controls ended in 1981, the refinery was modified to produce propane. It has sold propane to Gasco and to Aloha Gas, a small new propane distributor. It has expressed a willingness to sell propane to Oahu Gas.

Another basis for Oahu's allegations was Gasco's marketing program in 1982. During the energy crisis, demand for

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propane fell as consumers turned to alternative energy sources. With the end of regulation in 1981 and the beginning of propane production at Hawaiian's refinery in 1982, propane supplies became more plentiful. Gasco began a marketing program in 1982 that included offers of low-cost long-term contracts to large-volume purchasers, both its own customers and customers served by Oahu Gas. The prices offered were above Gasco's average total cost of supplying propane, but Oahu asserted at trial that the offers were "shams," designed to force Oahu to cut prices to its own customers. Oahu did cut prices to those customers, resulting in such low profits, Oahu claims, that it was nearly put out of business. None of Oahu's customers accepted Gasco's offers. Several of Gasco's own customers accepted the offers. In June 1982, Oahu sought and obtained an injunction prohibiting Gasco from soliciting Oahu's customers while they were under contract to Oahu.

The record indicates several uncontroverted facts relating to the relevant market and market shares of Gasco and Oahu Gas. Before Oahu began business in 1972, Gasco served 100% of the propane market on Oahu and in the "outer islands." After Oahu Gas began operating, Gasco's share of the market on Oahu declined steadily. By 1983, before the trial, Oahu sold about 30% of the propane in Oahu. Oahu Gas dominated sales to high-volume commercial and industrial users on Oahu, supplying 78% of that sub-market in 1985. Gasco supplied about 20% of those customers; Aloha Gas supplied the remaining 2%. Oahu Gas did not sell propane in the outer islands.

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DISCUSSION

1. *Monopoly Power in the Relevant Market*

[1] The offense of monopolization under Section 2 of the Sherman Act has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); *see also Catlin v. Washington Energy Co.*, 791 F.2d 1343, 1347 (9th Cir. 1986) (making explicit as a third factor the implicit requirement of "causal antitrust injury"). We review first the jury's finding that Gasco possessed monopoly power in the Hawaiian propane market from 1972 to 1983, the relevant period for purposes of Oahu's allegations of exclusionary conduct. Our previous decisions establish that both market definition and market power are essentially questions of fact. *See, e.g., Twin City Sportservice v. Charles O. Finley & Co.*, 676 F.2d 1291, 1299 (9th Cir. 1982) ("The definition of the relevant market is basically a fact question dependent upon the special characteristics of the industry involved . . ."); *Greyhound Computer Corp. v. International Business Machines Corp.*, 559 F.2d 488, 496-97 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978) (reviewing the jury's finding of monopoly power for sufficiency of the evidence). We thus review the evidence on these factual issues in the light most favorable to Oahu and draw all reasonable inferences in its favor, for this is an appeal from the denial of a motion for judgment notwithstanding the verdict. *See Peterson v. Kennedy*, 772 F.2d 1244, 1252 (9th Cir. 1985), *cert. denied*, _ U.S. _, 106 S. Ct. 1642 (1986) ("A JNOV is improper if reasonable minds could differ over the verdict").

A. *Market Definition*

[2] A determination of the relevant market typically requires an inquiry into the nature of the product, *see, e.g.*,

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United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 391 (1956), and the geographical area of effective competition. *United States v. Grinnell*, 384 U.S. at 575-76. Although product definition and geographical definition are theoretically separable inquiries, in this case they are intimately intertwined. Oahu asks us to affirm the jury's finding that the relevant market was inclusive of all propane sales in Hawaii. Gasco, on the other hand, argues that the relevant market was limited to high-volume industrial and commercial users of propane. These high volume users, the evidence suggested, were located either primarily or exclusively in Oahu. The arguments made at trial and pressed before us, though not extensive on the issue of market definition, make clear that the crux of the parties' dispute is product definition rather than geographical definition. We thus focus on product definition first, keeping in mind the importance of delineating the geographical market as well for its bearing on Gasco's market power.

[3] The issue of product definition, though always an inexact science often requiring distinctions in degree rather than kind, *see* 2 P. Areeda & D. Turner, Antitrust Law ¶ 518 (1978), is especially complicated in this case. During the course of the litigation, three plausible product markets have been suggested by the parties as the proper subjects of focus for purposes of our antitrust inquiry. On the broad end of the scale, it was suggested by Gasco at trial and in its motions before the district court, though not before us, that the jury erred by failing to include in its product definition numerous alternative energy sources that were said to constrain significantly any potential control over prices or competition in the propane market. A second possible delineation of the product market, the one with an intuitive if not necessarily a strong economic appeal, is all propane distribution in Hawaii; this is the market definition that the jury adopted. A third approach, first suggested by Gasco before the district court in its brief in support of its motion for a new trial and renewed on appeal, would be to define the relevant market in a relatively narrow

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fashion, limiting it to high-volume commercial and industrial users of propane.

[4] Our review is limited, of course, to an assessment of the evidence in the light most favorable to Oahu. Thus, if the evidence was sufficient to allow a reasonable jury to define the relevant market for antitrust purposes in terms of propane distribution in Hawaii, we are required to accept the jury's fact-finding on this issue. *See Los Angeles Memorial Coliseum Commission v. National Football League*, 726 F.2d 1381, 1392 (9th Cir.), *cert. denied sub nom. National Football League v. Oakland Raiders, Ltd.*, 469 U.S. 990 (1984).

[5] Unfortunately, a review of the evidence that was presented to the jury in this case does not shed considerable light on the proper market definition. The jury did hear testimony from Oahu's expert, Dr. Meier, to the effect that propane was the relevant market because conversion to alternative energy sources, such as electricity or heat pumps, would be too expensive for many propane users. This argument was made, of course, in response to Gasco's contention that the product market should have been defined *more* broadly than just propane, and we must view it in that light. It is clear from Dr. Meier's testimony, however, that his impression of the constraints upon cross-elasticity of demand was more applicable to small residential users of propane than to high volume commercial buyers. Arguably, in responding to the argument for a broader product market, Dr. Meier may be said to have opened the door inadvertently to a logical inference in favor of a narrow market definition.

[6] This narrow definition also finds support in other materials relied upon by Oahu. In its memorandum before the district court in opposition to Gasco's motion to set aside the verdict, Oahu made much of the testimony of Howard Lee that "once a house is gassed, it's gassed, probably for ten, twenty, thirty years and to change it back to electricity, financially it's not practical." There was also the testimony of Lam-

bert Lui-Kwan, Oahu's Director of Sales, that Oahu did not want residential customers because it viewed their business as unprofitable, and that Oahu therefore referred inquiries about residential service to Gasco. As a result, Oahu Gas, by 1983, had come to dominate sales to high-volume commercial and industrial users on the island of Oahu but had no business among either residential users on Oahu or on the outer islands.

[7] Had Gasco reinforced this testimony regarding the differences between residential and commercial use of propane with further evidence of the constraints upon which residential and commercial suppliers operate, it is possible that a reasonable jury would have had no alternative but to conclude that high-volume industrial sales were the relevant market in this case. Gasco did not do this, however, preferring instead to focus at trial upon the theoretical interchangeability between propane and other energy sources. Gasco made no effort at trial to distinguish between residential and commercial use of propane. Consequently, the question submitted to the jury with regard to product definition was limited to its assessing the evidence of user substitutes and deciding whether alternative energy sources significantly impacted upon propane distribution. Viewing the evidence from this perspective and in the light most favorable to Oahu, we cannot say that the jury acted unreasonably in concluding that the relevant market included commercial and residential propane, but not other sources of energy such as electricity.

[8] As to geography, this segment of the inquiry into market definition is clearly subsidiary to product definition. No effort was ever made, for example, to differentiate between commercial and residential propane sales on the island of Oahu on the one hand and propane sales on all the islands on the other. This is partly because commercial sales on the outer islands are negligible and partly because Oahu Gas sold only to commercial users on the island of Oahu. In either case, we are convinced, in part because of some of Gasco's

own arguments, that the jury could reasonably have defined the geographical market for propane to include the outer islands. In contending that the ease of entry into the propane distribution business precluded its exercise of monopoly power, Gasco states, perhaps inadvertently: "The undisputed evidence surrounding [Oahu Gas]'s own entry into the propane business in 1972 demonstrated that [Pacific Resources] and Gasco had no power to exclude new entrants from selling propane *in Hawaii.*" (Emphasis added). Gasco presented no evidence to the jury, nor to us, regarding transportation costs to the outer islands or other barriers between the island of Oahu and its smaller compatriots. Accordingly, we affirm the jury's definition of the geographical market to include all of Hawaii.

Our conclusion that the jury acted reasonably in its market definition is made with some questions as to whether the correct result was reached. These reservations might ordinarily give us pause, especially since our affirmance leads inexorably to the conclusion that Gasco wielded considerable power in the relevant market. *See* Section IB, *infra*. However, as our discussion of the second part of the test for monopolization demonstrates below, a finding of monopoly power has no bearing in this case on liability. We are therefore content to assume *arguendo* the existence of monopoly power, as we have done in previous cases in which the other requirements for maintaining a Section 2 action were in doubt. *See, e.g., Transamerica Computer Co., Inc. v. International Business Machines Corp.*, 698 F.2d 1377, 1382 (9th Cir. 1983), *cert. denied*, 464 U.S. 955 (1983); *California Computer Products, Inc. v. International Business Machines Corp.*, 613 F.2d 727, 739 (9th Cir. 1979).

B. *Market Power*

[9] The jury found that Gasco possessed monopoly power in the Hawaiian propane market. Our review of that finding is limited again to an assessment of the evidence in the light

most favorable to Oahu. The evidence demonstrated that Gasco was the exclusive seller of propane to residential sellers on Oahu and on the outer islands. As a result of this dominance of certain parts of the market, Gasco's overall market share in the Hawaiian propane market was consistently above 68% from 1972 to 1983. The parties are essentially in agreement on the computations of Gasco's market share, which declined from a figure of 100% in 1972 to 95.5% in 1973, to 89.7% in 1974, to 69.6% in 1981, and finally to 68.2% in 1983. They disagree as to the legal conclusions that may be drawn from these statistics and other evidence. Oahu maintains that the evidence of Gasco's high market share and the lack of evidence of "meaningful entry" by other firms into the Hawaiian propane market from 1973 to 1984 support an inference of monopoly power. Gasco maintains that the evidence of its steadily declining market share during the relevant period, combined with what it contends is the absence of evidence in the record of barriers to entry or an ability on Gasco's part to control prices, precludes any finding that it possessed monopoly power.

[10] Inquiries into the existence of monopoly power focus generally on a firm's ability to "control prices or exclude competition." *Greyhound Computer*, 559 F.2d at 496 (quoting *United States v. duPont*, 351 U.S. at 391). Although no single factor has been held determinative as to the existence of such power, inquiries in this area often depend heavily upon market share and barriers to entry. *See Ball Memorial Hospital, Inc. v. Mutual Hospital Ins., Inc.*, 784 F.2d 1325, 1336 (7th Cir. 1986). A firm with a high market share may be able to exert market power in the short run, but "[s]ubstantial market power can persist only if there are significant and continuing barriers to entry." 2 Areeda & Turner, *supra*, at ¶ 505; *accord Cargill Inc. v. Monfort of Colorado*, _ U.S. _, 107 S. Ct. 484, 494 n.15 (1986).

Keeping these factors in mind and viewing the evidence most favorably to Oahu Gas, we now address the parties' con-

tentions. Oahu makes two arguments in support of the jury's finding of monopoly power. First, Oahu maintains that Gasco's high market share constitutes substantial evidence of monopoly power in spite of the evidence that that share constantly declined throughout the relevant period. Gasco argues, to the contrary, that the decline in its market share reflects an absence of monopoly power. Second, Oahu claims that the record, which reflects a virtual lack of entry by new firms into the Hawaiian propane market during the relevant time period, falls short of establishing the kind of competitive marketplace necessary to rebut the inference of monopoly power raised by Gasco's high market share. *See Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 925 (9th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981).

If any conclusion may be gleaned from our prior decisions and those of the Supreme Court with regard to the first issue, it is that "market share is just the starting point for assessing market power." *Id.* A high market share, though it may ordinarily raise an inference of monopoly power, *see United States v. Grinnell*, 384 U.S. at 571, will not do so in a market with low entry barriers or other evidence of a defendant's inability to control prices or exclude competitors. By the same token, "A declining market share may reflect an absence of market power, but it does not foreclose a finding of such power." *Greyhound Computer*, 559 F.2d at 496 n.18 (citations omitted). Applied to this case, these principles lead to the conclusion that provided the jury heard substantial evidence of Gasco's high market share throughout the relevant period, the decline in its market share could not preclude a finding of monopoly power as a matter of law. If, however, the sole basis for the jury's finding was Gasco's high market share, this finding could not stand up in the face of a showing of low entry barriers or other significant constraints on Gasco's power over the marketplace.

[11] Because the jury clearly heard substantial evidence relating to Gasco's market share, we proceed to the question

of entry barriers, which are in dispute. Oahu maintains that the lack of entry by competitors into the market is sufficient to support an inference of high entry barriers. Gasco argues that the entry of Oahu and Aloha demonstrated that Gasco lacked the ability to control prices or to exclude new entrants.

[12] We note preliminarily that both parties could theoretically be correct, if in fact Gasco lacked the power to exclude but there were external factors at work precluding entry into the market. In ordinary times, the failure of other firms to challenge Gasco on the outer islands and in the Oahu residential market might have supported an inference that Gasco had the power to exclude competitors or to control the price without much detailed inquiry. But because of the price controls that were in place from 1974 to 1981, Gasco clearly could not control the price and may not have had any control in the marketplace whatsoever. Thus, the question is whether Gasco could exclude rivals. In this regard, the jury learned of two entrants into the market from 1972 to 1984: Oahu and Aloha. Oahu entered the market in 1972 and consistently increased its market share thereafter, even during the period of price controls. Although this evidence of entry might tend to suggest that as of 1972, Gasco — which was dependent upon Chevron for propane supplies — could not exclude rivals, the jury also considered evidence that the founder of Oahu, once an executive with Gasco, took some large accounts with him when he left Gasco. This evidence supports an inference that Oahu's success may have owed not so much to its competition on the merits in an open market as to the "insider" status of its founder, and does not negate the inference of high entry barriers. The second entrant, Aloha Gas, did win some accounts, but the evidence that that firm remained very small could reasonably preclude a decision that Aloha's entry reflected a breakdown of barriers to entry. Viewed in the light most favorable to Oahu, therefore, the evidence reasonably supports the conclusion that high barriers to entry existed in the Hawaiian propane market throughout the relevant time period.

The ultimate focus of our inquiry, however, is Gasco's power, not barriers to entry. Oahu points to no further evidence of Gasco's ability to exclude competition, and Gasco's arguments regarding price controls go to its ability to control price, not to exclude competitors. Consequently, the question before us is whether the jury could reasonably have found that a firm with a consistently high, albeit declining, market share in a market with high barriers to entry possessed monopoly power. The answer is yes. "While market share is just the starting point for assessing market power, we think that market share, at least above some level, could support a finding of market power in the absence of contrary evidence." *Hunt*, 627 F.2d at 925. Clearly, Gasco had a high market share, and the record does not permit us to infer "contrary evidence" that would negate a finding of market power. Hence, we affirm the jury's finding that Gasco possessed monopoly power.[1]

II. ALLEGEDLY MONOPOLISTIC BEHAVIOR

[13] The second element of monopolization under Section 2 of the Sherman Act is "the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell*, 384 U.S. at 570-71. The jury was asked to determine whether two courses of conduct by Gasco — a 1972 decision not to modify its refinery to permit propane production and a 1982 marketing campaign targeted at Oahu's clientele — constituted predation within the meaning of Section 2. The jury found in the affirmative on both counts. These determinations that specific conduct was anticompetitive in violation of the Sherman Act are questions of law that we review *de novo*. *Western Concrete Structures Co. v. Mitsui & Company*

[1]Because we uphold the jury's finding of monopoly power, we need not consider the attempted monopolization claim that was an alternative ground for the jury's verdict.

(U.S.A.), Inc., 760 F.2d 1013, 1016 (9th Cir.), *cert. denied*, 474 U.S. 903 (1985).

A. *The Decision Not to Expand the Refinery*

The factual questions about Pacific Resources' allegedly exclusionary conduct in the early 70s were resolved at trial. It was clear that expanding the refinery to permit propane production would have been uneconomical under federal price controls in place at the time. It was also clear, however, that the decision not to produce propane had been based not only on economic factors but also on a desire to restrict the supply of propane potentially available to Oahu Gas. There is evidence in the record that the management of Pacific Resources feared that increasing the supply of propane in Hawaii would result in Oahu's getting more propane to sell, increasing its market share.

[14] The desire to maintain or increase one's market share is not in itself an antitrust violation, of course. Nor is a decision to forego the production of propane an illegal act *per se*. But a monopolist must take care that otherwise lawful acts do not have anticompetitive effects because of its monopoly power.

[15] We therefore reject Pacific Resources' broad contention that the antitrust laws may never impose duties on a monopolist to aid its competitors. Because of a monopolist's special position the antitrust laws impose what may be characterized as affirmative duties.[2] These duties are not absolute, however; they arise only when there is no justification for refusing to aid a competitor.

[2]For example, a ski resort with monopoly power was required to continue a marketing arrangement with its small neighbor where there was no legitimate business justification for discontinuing it, and the arrangement increased competition and benefited consumers. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

[16] Where a monopolist's refusal to aid a competitor is based partially on a desire to restrict competition, we determine antitrust liability by asking whether there was a legitimate business justification for the monopolist's conduct. *See Aspen Skiing Co. v. Aspen Highland Skiing Corp.*, 472 U.S. 585 (1985); *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1478 (9th Cir. 1986); *Drinkwine v. Federated Publications, Inc.*, 780 F.2d 735, 740 (9th Cir.), *cert. denied*, 106 S. Ct. 1471 (1986).

[17] The investment required of Pacific Resources to produce propane would have resulted in a negative return. In light of the then-existing price controls, it was not economically efficient for Pacific Resources to invest its resources in propane production. The decision to forego propane production did not exclude competition unnecessarily. The economic rationale, even if not the only rationale for the decision, excluded competition necessarily. Economic necessity distinguished this conduct from "willful acquisition or maintenance of [monopoly] power," *United States v. Grinnell*, 384 U.S. at 570-71, because it involved the 'business acumen' that *Grinnell* specifically exempts from antitrust liability. *Id.*

[18] The jury was instructed improperly. It was given an either/or choice: it could decide whether Pacific Resources' decision was based on economic motives *or* on a desire to maintain its market share.[3] It should have been instructed

[3]The jury instruction on this issue was:

> To sum up, you must determine whether PRI and Gasco maintained monopoly power in a relevant market by policies and conduct which were not legitimate business decisions but were instead designed primarily to further any domination of a relevant market. . . .
>
> You should seek to determine if the challenged conduct is supported by legitimate business reasons or whether it was a deliberate effort to injure a smaller rival which caused defendants to sacrifice short-run benefits and consumer good will.

that the desire to maintain market power — even a monopolist's market power — cannot create antitrust liability if there was a legitimate business justification for refusing to produce propane.

Two lines of cases support our holding, though they are not directly controlling. A line of "product innovation" cases has consistently rejected antitrust liability for a monopolist's decision about when or whether to market new products. *See, e.g., Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 545 (9th Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984); *California Computer Products v. I.B.M. Corp.*, 613 F.2d 727 (9th Cir. 1979); *see also GAF Corporation v. Eastman Kodak Co.*, 519 F. Supp. 1203, 1232 (S.D.N.Y. 1981) ("[N]o court has yet found a monopolist's failure to market a product as satisfying § 2's conduct requirement.").

These cases, involving technological innovations, have held that the contested marketing decisions derived from "a superior product", and are therefore exempt from antitrust liability. Oahu Gas contends that such cases are inapposite, because the product at issue here is propane, hardly an innovation. But business acumen — the economics of timing a technological innovation — is also an aspect of these cases.

In *California Computer* we addressed specifically the issue of when a question of legitimate business purpose may go to a jury. Where IBM redesigned products in such a way that they were incompatible with a competitor's product, and where such design changes were justified "by reason of lower manufacturing cost and price or improved performance[,] . . . [t]he reasonableness of IBM's conduct . . . did not present a jury issue." *California Computer Products*, 613 F.2d at 744.

[19] Another line of cases that Oahu asks us to consider are "supply restriction" cases. It contends that Pacific Resources impermissibly sought to restrict the supply of propane in the Hawaiian Islands. *See, e.g., NCAA v. Board of Regents*, 468

U.S. 85 (1984); *Litton Systems, Inc. v. AT&T*, 700 F.2d 785 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984); *Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976). A theory of liability based on "supply restriction" must fail because Pacific Resources had no monopoly power over supplies of propane to Hawaii. Chevron produced all Hawaiian propane until 1982.[4] Contrary to Oahu's argument, the regulatory scheme in place in the 70s did not give Pacific Resources control over propane supplies. Oahu appealed to the Department of Energy for larger allocations of propane, and it was ultimately successful. Oahu's supply restriction theory cannot support antitrust liability for Pacific Resources' decision not to produce propane.

[20] As a matter of law, we reverse the judgment of antitrust liability based on the refinery episode. Pacific Resources' decision to refrain from producing propane because it was not economically efficient is sufficient justification to preclude antitrust liability.

B. *Gasco's 1982 Marketing Campaign*

[21] The jury found that Gasco's 1982 campaign to offer cut-rate contracts to large propane purchasers was anticompetitive and predatory. Oahu defends this result on the ground that Gasco "made false 'offers' without ever intending to compete for that business." Gasco disputes the finding of predatory conduct, arguing that it "had the absolute right to offer reduced prices so long as those offers were not shown to be below costs or shown to be predatory by clear and convincing evidence."

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[4] For this reason the "essential facilities" theory would not apply either. *See MCI Communications Corp. v. AT&T Co.*, 708 F.2d 1081, 1132 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983) (plaintiff must show control of the essential facility by a monopolist).

[22] The parties' legal dispute may be summarized as follows. Neither party argues that Gasco set prices below its costs for the purposes of alluring Oahu's customers. The allegation of exclusionary conduct is not founded, therefore, on a theory of predatory pricing. Rather, Oahu's claim is that the insincerity or "sham" nature of Gasco's offers is sufficient to support a finding of predatory conduct.

[23] The first question — whether the offers were "shams" — may be disposed of quickly. Reviewing the factual evidence in this appeal from a denial of a JNOV motion, we draw all reasonable inferences in Oahu's favor. The jury having returned a general verdict, we must presume it to have accepted Oahu's claim that Gasco's offer of cut-rate contracts were "shams." This finding was reasonably supported by the evidence. The jury heard evidence, for example, that most of the customers of Oahu Gas that Gasco solicited were known to have long-term contracts with Oahu that they would be unlikely to break. A Gasco employee testified, moreover, that when making an offer to an Oahu customer, she invited the customer to ask Oahu to meet or beat the offered price-cut. This testimony provides support for an inference that Gasco's true goal was not to attract customers, but to cut into Oahu's profits. Oahu also offered evidence, which we must presume the jury found credible, that Gasco did not make the same offers to its own customers as it did to Oahu's. This evidence, taken in full, is substantial enough to sustain Oahu's claim that Gasco's offer did not reflect a business risk on its part but only constituted a ploy to entice Oahu to lower *its* prices.

[24] The harder question is whether this "sham" offer violated Sherman Act Section 2. Although the evidence supports the jury's finding of a predatory intent underlying Gasco's marketing campaign, the net result of this campaign seems to have been to increase competition in the market by inducing Oahu to lower its prices. Thus, we have before us a situation

in which conduct with a predatory rationale had a procompetitive effect.

[25] In order to sustain the jury's finding of predation, we would have to turn our back on a large body of case law holding that "[t]he test of willful maintenance or acquisition of monopoly power is whether the acts complained of unreasonably restrict competition." *Drinkwine v. Federated Publication, Inc.*, 780 F.2d 735 (9th Cir. 1985), *cert. denied*, __ U.S. __, 106 S. Ct. 1471 (1986). Here, there was no restriction on competition, let alone an unreasonable restriction. To be sure, Gasco's intent is not irrelevant to the inquiry. *See id.* (citing *Aspen Skiing*, 472 U.S. at 602-03) ("Intent must also exist but is subsumed in an analysis of the exclusionary conduct"). But a finding of anticompetitive intent will not sustain a Section 2 claim in the face of evidence of procompetitive effects.

[26] This analysis should not be taken as an endorsement of Gasco's conduct. A campaign to harm or destroy rivals through deceptive marketing smacks of unfair competition, whose hallmark is harm to competitors. In seeking to induce Oahu's clients to abandon Oahu or to force Oahu to accept lower profits, Gasco engaged in activity that in some jurisdictions is actionable under the law of torts.

The goal of the antitrust laws, however, unlike that of business tort or unfair competition laws, is to safeguard general competitive conditions, rather than to protect specific competitors. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977). Professors Areeda and Turner, in their discussion of the antitrust liability of firms that engage in unfair competition, stated in a passage of particular relevance here:

> [W]hile it may be a tort for a defendant to induce another to deal in violation of his contract with the defendant's rival, it should not be an exclusionary practice. Buying an employee away from a rival, for

> example, does not impair competition any more when that employee was under a long term contract than when he was not. The competitive effect, if any, results from the transfer of resources or patronage away from the rival and to the monopolist. . . . If there is a tort, so be it. But antitrust law should not make liability depend upon the existence or non-existence of contracts which do not affect the competitive results.

3 P. Areeda & D. Turner, Antitrust Law ¶ 7381 (1978).

[27] We reverse the jury's finding of antitrust liability growing out of Gasco's 1982 marketing campaign. The undisputed evidence in the record that this campaign resulted in no anti-competitive effects precludes a finding of liability even though we accept the jury's conclusion that Gasco intended the campaign to harm Oahu and thereby to increase its market share.

CONCLUSION

We reverse the jury's findings of antitrust liability with respect to both the refinery decision and the marketing campaign. Consequently, we need not address the parties' respective contentions on the subject of damages.

REVERSED.

FILED
MAR 22 1988
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OAHU GAS SERVICE, INC., Plaintiff-Appellee, v. PACIFIC RESOURCES, INC.; GASCO, INC., Defendants-Appellants.	CA No. 86-2250 DC No. CV-77-0444-PGR (Hawaii) ORDER

Before: WRIGHT, FARRIS, and THOMPSON, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Farris and Thompson have voted to reject the suggestion for rehearing en banc and Judge Wright recommends rejection.

The full court has been advised of the suggestion for an en banc hearing and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

No. 86-2250
(USDC Hawaii: Civil No. 77-0444)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OAHU GAS SERVICE, INC.,
Plaintiff-Appellee,
vs.
PACIFIC RESOURCES INC., and GASCO INC.,
Petitioners, Defendants-Appellants.

PETITION FOR REHEARING WITH SUGGESTION OF REHEARING EN BANC

I. INTRODUCTION

Petitioners Pacific Resources Inc. ("PRI") and Gasco Inc. ("Gasco") hereby respectfully petition for reconsideration of the opinion filed October 9, 1987.

In this Section 2 Sherman Act suit involving retail distribution of propane in Hawaii, the trial court entered

judgment for treble damages in favor of plaintiff Oahu Gas Services, Inc. ("OGS"), against petitioners for, *inter alia*, offering reduced prices to high volume commercial propane purchasers on the Island of Oahu. The opinion affirms that portion of the judgment on the theory of unlawful monopolization by predatory pricing, even though it finds the evidence to be uncontroverted that the reduced prices offered by Gasco were above average total cost, that Gasco's share of the Oahu propane market had steadily declined after the entry of OGS in 1972, and that by 1985 OGS had captured 78% of the "sub-market" of high volume commercial and industrial propane customers (Slip Op. 5-6).[1]

The opinion concludes that there was clear and convincing evidence from which the jury could find that Gasco's offers of reduced prices were "shams" and thus had a "predatory rationale" (Slip Op 12-13) and that the jury could reasonably infer that Gasco had monopoly power in the relevant market because of a "potential for genuine adverse effects on competition" (Slip Op. 7-8). Yet, the opinion wholly fails to identify any evidence or theory supporting an inference of actual injury to competition arising from Gasco's offers of reduced prices or antitrust injury to plaintiff.

In the judgment of counsel filing this Petition, the opinion's holdings (1) that offers of price reductions above average total cost are predatory if "shams" in the sense that they were unlikely to be accepted and (2) that monopolization can be found in a market lacking significant barriers to entry or ability to control prices

[1] The opinion, which we attach as an Appendix, also reverses a major portion of the judgment relating to petitioners' decision not to invest in a refinery modification to produce propane during the period of government price controls.

conflict with other decisions of this Circuit in respects not addressed in the opinion. (3) the opinion also overlooks and fails to decide a material issue of law relating to post-injunction damages. In the interest of maintaining uniformity of this Court's decisions on issues of exceptional importance, en banc consideration is appropriate, we respectfully submit.

II. GROUNDS FOR PETITION

A. The Opinion's Predatory Pricing Holding Conflicts With The Prior Decisions Of This Circuit.

1. Price Reductions Above Average Total Cost Are Lawful In The Absence Of Clear And Convincing Evidence Of Injury To Competition.

The law of predatory pricing, as applied in this Circuit in *California Computer Products, Inc.* v. *International* Business Machines Corp, 613 F.2d 727 (9th Cir. 1979) and its progeny, is that prices above average total cost are lawful unless there is clear and convincing evidence of an injury to *competition*, *Drinkwine* v. *Federated Publications, Inc.*, 780 F.2d 735, 739 (9th Cir. 1985), *cert. denied*, 106 S.Ct. 1471 (1986), and that an intent or "rationale" to injure a competitor is insufficient. *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F.2d 1014, 1028 (9th Cir. 1981), *cert.* denied, 459 U.S. 825 (1982); *Airweld, Inc.*, v. *Airco, Inc.*, 742 F.2d 1184, 1192 (9th Cir. 1984), *cert. denied*, 469 U.S. 1213 (1985).

The rule as applied to prices above average total costs was first stated in *Transamerica Computer Co.* v. *IBM*, 698 F.2d 1377, 1388 (9th Cir. 1983), *cert. denied*, 464 U.S. 955 (1983). The Court affirmed a judgment in favor of the defendant because the evidence did not show by clear and convincing evidence that it is "highly probably

true" that the defendant's pricing policy was predatory (*ibid*). In rejecting the district court's test of *per se* legality for prices above total average costs, the Court stated that such prices will "rarely" be predatory (*ibid.*) and hypothesized that "limit" pricing and temporary reductions designed to discourage new entrants could be shown to be exclusionary (*id.* at 1387). Subsequent cases, including *Drinkwine, supra* and *Airweld, supra,* make clear that to support a finding of predatory pricing there must be objective evidence of exclusionary conduct that injures competition other than an intent to injure a competitor. *See Olympia Equipment Leasing Co.* v. *Western Union & Tel. Co.,* 797 F.2d 370, 379 (7th Cir. 1986), *cert. denied,* 107 S.Ct. 1524 (1987).

2. The Opinion Fails To Find Any Injury To Competition.

The fatal flaw of the predatory pricing theory of the decision is that it assumes without discussion or analysis that a "sham" offer of reduced prices by Gasco could injure competition or cause antitrust damage to the plaintiff. Further, the opinion's discussion of the evidence fails to identify any acts by Gasco that remotely violate the Sherman Act.

After stating the competing contentions of the parties and referring to the concession that Gasco's reduced prices were above average total cost, the opinion states that plaintiff must prove by clear and convincing evidence that "defendant's pricing policy had a predatory rationale" (Slip Op. 12). The opinion then reasons that while in the "typical predatory pricing campaign", a monopolist is willing to risk short term "losses" to "eliminate" a competitor, here there was no risk to Gasco of such losses if the offers were "shams" (*ibid.*); further, the opinion holds that the jury may "be presumed to

have accepted" the claim that the offers were "shams", and there is evidence to support such a claim, to wit, (1) plaintiff's customers had long-term contracts with plaintiffs "that they would be unlikely to breach," (2) a Gasco employee "invited" the customer to ask plaintiff "to meet or beat" the offered price, and (3) Gasco did not make the "same offers" to its own customers that it made to plaintiff's customers (Slip Op. 13). The opinion's discussion of this issue then concludes with the assertion that "on this record" the trial court's "denial of the JNOV" was not improper (*ibid.*). What is missing from the foregoing discussion is any analysis or expanation of how any of the things described could injure competition or cause antitrust injury to the plaintiff.

That a typical monopolist will sustain short term losses to eliminate competitors is a theory that cannot support liability in this case. Gasco's offers, if accepted, would not result in losses to Gasco in the short run or otherwise: This follows necessarily from the undisputed fact that the offers were above average total cost. Hence, if the offers were genuine, they would not be illegal under traditional Section 2 analysis. If the offers were in fact "shams" in the sense that they could not have been accepted, they could have no economic effect, and there would be no occasion for OGS to reduce its prices to meet those offers.

Gasco's belief that plaintiff's customers would be "unlikely" to accept its offers of reduced prices, either because of prior contractual arrangements or expected price reductions by plaintiff, and its suggestions that the customers ask plaintiff to "meet or beat" the offers (Slip Op. 13) does not make the offers either sham or illegal under the Sherman Act. Indeed, offers of price

reductions with even the remote chance of gaining market share are the essence of competition:

> [T]he antitrust laws do not require the courts to protect small businesses from the loss of profits due to continued competition, but only against the loss of profits from practices forbidden by the antitrust laws. . . . To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result, for "it is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition." *Arthur S. Langanderfer, Inc.* v. *S. E. Johnson Co.*, 729 F.2d 1050, 1057 (C.A. 6), *cert. denied*, 469 U.S. 1036 (1984).

Cargill, Inc. v. *Monfort of Colorado, Inc.*, ____ U.S. ____, 107 S.Ct. 484, 492. 2d 427 (1986). An offer of a reduced price that is procompetitive if accepted does not become anticompetitive if rejected.[2] The rationale of the opinion would necessarily chill above cost price reductions by a large competitor because of a concern that a smaller competitor will hold market share by reducing its prices and then recover treble damages because defendant's price reductions were unsuccessful in capturing market share.

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[2] Neither does Section 2 of the Sherman Act require that the same offers be made to the customers of one's competitors as are made to its own customers. Thus, in *Drinkwine* v. *Federated Publications, Inc., supra*, 780 F.2d at 738-39, this Court held above cost price reductions made *only* to plaintiff's customers to be lawful. "Even if . . . [defendant] juggled its prices depending on competition, it is insufficient to show predatory conduct." (*Id.* at 739.)

On analysis, the opinion does not identify any evidence to support a finding that the offers could not be accepted and were thus sham. That Gasco thought it "unlikely" that they would be accepted does not mean they could not be. It was undisputed that the offers, if accepted, would have been legally binding on Gasco, that OGS in fact reduced its own prices as a competitive response and continued to sell propane at a profit and to increase its market share, and that Gasco's offers of reduced prices to some of its own customers were accepted. The opinion wholly ignores these obvious benefits to competition resulting from Gasco's offers and loses sight of the fundamental distinction, frequently noted by the prior opinions of this Circuit, that the Sherman Act is designed to protect "*competition, not competitors.*" *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 320 (1962).

In sum, the evidence discussed in the opinion falls far short of the kind of clear and convincing evidence that would permit a trier of fact to find predatory pricing or injury to competition when the prices were above average total cost.

B. The Opinion Fails To Decide The Legal Issues Of Market Definition And Monopoly Power.

The opinion mistakenly fails to determine as a matter of law whether or not on the undisputed evidence Gasco had monopoly power in a relevant market. Instead, the opinion finds that the jury could have determined that the "arrangement", *i.e.* Gasco's offers of competitive prices above its average total cost "has the potential for genuine adverse effects on competition" (Slip Op. 7-8). Because there is no evidence cited by the opinion that Gasco's offers injured competition, and the evidence is that the offers were beneficial to competition (*supra*,

p.6), the opinion erroneously fails to address the legal questions of market definition and market power.

The opinion asserts that Gasco's dominance of propane distribution in the "outer islands" is evidence supporting the jury's finding of "market power" (Slip Op. 8). The opinion thus betrays a confusion about relevant market and market power. The competition between OGS and Gasco is confined to Oahu, and Gasco's offers of reduced prices to OGS customers held to be predatory occurred only on Oahu. The only relevant geographic market or submarket is Oahu. And the opinion should have made that determination as a matter of law.

The opinion suggests that the "evidence about the difficulty of entry into the propane market" supports the jury's finding (Slip Op. 8). The undisputed evidence is that there are no significant barriers to entry. OGS and Aloha Gas have both entered and expanded their market shares. The opinion at this point wholly ignores the undisputed evidence, noted at the outset, that OGS has steadily increased its market share and that it "dominated" the "submarket" of large volume industrial and commercial customers to whom Gasco made its supposedly predatory offers (Slip Op. 6). The opinion's conclusion that there is a rational basis in the record to support a jury finding of monopoly power in a relevant market is thus fundamentally in conflict with the established law that monopoly power cannot exist in the absence of the power to exclude competitors or control prices. *United States* v. *Grinnell*, 384 U.S. 563, 571 (1966); *California Computer Corp.* v. *IBM*, *supra*, 613 F.2d at 735.

C. The Opinion Fails To Decide The Issue Of Post Injunction Damages.

The opinion affirms damages against petitioners for times subsequent to which Gasco had been enjoined from offering lower prices to plaintiff's customers. The opinion mistakenly asserts (Slip Op., p.14) that whether or not plaintiff was able to raise its prices immediately after the injunction "is an issue of fact that the jury resolved" against petitioners. The jury received no evidence or instructions with respect to the injunction issue. This was a question that was presented to the trial court as a matter of law and should have been similarly resolved by this Court.

Prior to the beginning of the trial, the parties stipulated that the preliminary injunction against PRI and Gasco and the subsequent order that OGS abused the injunction would not be mentioned before the jury (Transcript of Proceedings, Posttrial Motions, at 59). Thus, the jury could not possibly have considered the issue of whether OGS was able to raise its prices after the injunction was entered against PRI, as the jury was never informed that the injunction existed or instructed with particularity regarding the causation issue.[3]

As a matter of law, OGS cannot recover as damages the lost profits resulting from OGS's voluntary discounts in effect after entry of the preliminary injunction forbade Gasco from continuing its offers of price reductions. This is so for two reasons. First, the entry of the preliminary injunction cut off the necessity for OGS to

[3]To the contrary, the only instruction mentioning the temporary volume allowance implied that if the jury found that PRI's 1982 marketing offers were unlawful, the jury should find that the temporary volume allowances were recoverable by OGS as damages. *See* Instruction No. 49, paragraph 3.

meet Gasco's competitive offers and broke the causative chain of antitrust injury as a matter of law. *Cf. Los Angeles Mem. Coliseum Comm'n* v. *NFL*, 791 F.2d 1356, 1372 (9th Cir. 1986). Second, an antitrust plaintiff, like any other plaintiff, is under a duty to mitigate its damages, a duty OGS failed to discharge when it continued its TVAs. *Golf City, Inc.* v. *Wilson Sporting Goods Co.*, 555 F.2d 426, 436 (5th Cir. 1977). The trial court erroneously rejected these contentions, and the opinion mistakenly overlooks this issue.

III. CONCLUSION

For all of the foregoing reasons, we respectfully pray that the petition be granted and that rehearing be held by the Court sitting en banc.

Respectfully submitted,

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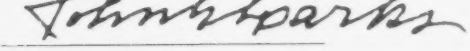
By 

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PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on June 17, 1988, I served the within *Petition For A Writ Of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
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I declare under penalty of perjury that the foregoing is true and correct. Executed on June 17, 1988, at Los Angeles, California.

Betty J. Malloy
(Original signed)